No. 83-1825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

VIRGINIA KIRK CORD,

Petitioner,

—vs.—

EDWARD D. NEUHOFF and CHARLES E. CORD, Co-Executors of the Estate of E. L. CORD, also known as ERRETT L. CORD and ERRETT LOBBAN CORD, and individually,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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May 25, 1984

QUESTION PRESENTED

Does this Court have jurisdiction under 28 U.S.C. § 1257(3) to review a decision of a state's highest court issuing a writ of prohibition where:

(a) The bias alleged to violate fourteenth amendment due process was not extrajudicial but based on an unfounded complaint by petitioner's attorney about delay by the judge in entering a decision after the judge *announced* his decision;

(b) The petition for writ of certiorari was filed with this Court over two years after final judgment on the merits by the state's highest court;

(c) No right was properly and specially set up or claimed under the Constitution, and the state court did not decide any federal question in the writ of prohibition proceedings; and

(d) The decision of the state court to issue the writ of prohibition was based solely upon adequate and independent state grounds?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

Respondents Charles E. Cord and Edward D. Neuhoff, co-executors of the estate of E. L. Cord, deceased, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the decision of the Supreme Court of the State of Nevada which granted a writ of prohibition in this case. That decision is unreported and is appended to the petition (Pet. App. C).

STATEMENT OF THE CASE

Background

On January 2, 1974, E. L. Cord died in Reno, Nevada, leaving an estate valued at $39,251,149.85. He was survived by his second wife, petitioner herein, and a son and three daugh-

ters. Based upon a 1953 post-nuptial agreement wherein petitioner released present and future community property rights, decedent's will declared his entire estate to be his separate property. During his lifetime, decedent had provided for petitioner by gifts and transfers from his separate estate valued at approximately $10,000,000. In January 1974, decedent's will was admitted to probate in the Second Judicial District Court in Reno, Nevada. Respondents were duly appointed and qualified as co-executors of decedent's estate.

In mid 1974, at petitioner's request and as provided by the will and with court approval, respondents distributed to her various bequests, appraised at approximately $1,344,000. In late 1974, however, petitioner sued respondents contending that decedent's estate in its entirety was community property, and that she was entitled to one-half thereof. In an unreported opinion, on January 20, 1977, the District Court (Guinan, J.) dismissed the action, holding that petitioner was precluded from asserting a community interest in decedent's estate because of the 1953 post-nuptial agreement.

Petitioner appealed. By opinion dated January 25, 1978, the Supreme Court of Nevada reversed and, for the reasons stated, annulled the post-nuptial agreement. The Supreme Court remanded for trial, with instructions as to the method to be used in determining the extent of petitioner's community interest in decedent's estate. The court's opinion is reported, *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978).

The trial after remand was a two-week, non-jury trial, with Judge Guinan presiding, concluding on March 27, 1979. On July 2, 1980, Judge Guinan informed petitioner that he had reached a decision in favor of respondents (Resp. App. A). The Court explained that, for lack of time, he had asked respondents' counsel to prepare proposed findings, conclusions, and a judgment. On November 5, 1980, the District Court entered its findings, conclusions of law and judgment, holding that, at the time of his death, the assets of decedent's estate were his separate property. The findings, conclusions and judgment are unreported but are reproduced herein (Resp. App. B).

The District Court's Recusal

In the meantime, on October 28, 1980, Judge Guinan was informed by the secretary of the Nevada Judicial Discipline Commission that petitioner's counsel had filed a complaint against him. The basis of the complaint was the allegedly lengthy delay (approximately seventeen months) by the court in issuing its decision after trial, affording petitioner "no other alternative but to go before the Commission and tell them that we wanted a decision" (Pet. App. B, A-5). Petitioner did *not* complain that Judge Guinan was "biased," but only not prompt. The Commission also advised the court that it had determined that the complaint was without merit (Pet. App. B, A-5).

On December 1, 1980, in chambers, Judge Guinan advised all counsel that he would recuse himself from all further proceedings in this action (Resp. App. C, 21a).

Pursuant to the written request of petitioner, on January 16, 1981, Judge Guinan, in open court, stated his reasons for recusing himself; namely, that petitioner's counsel had filed a complaint against him and that, "After due consideration of that event I decided that I entertain actual bias against her and through her against her client, Mrs. Cord, and, therefore, I can no longer proceed in these cases" (Pet. App. B, A-3).

Contrary to petitioner's assertion (Pet. at 1, 8), Judge Guinan never stated that his acknowledged bias arose and existed from October 28, 1980. However, he did state, in response to a question by respondents' counsel, that he did not have any bias, actual or implied, against either petitioner or her counsel prior to learning of the complaint to the Judicial Discipline Commission (Pet. App. B, A-4).

The Appeal to the Supreme Court of Nevada

Petitioner appealed to the Supreme Court of Nevada from the District Court's adverse judgment dated November 5, 1980. On January 16, 1981, petitioner served and filed her opening brief before the Supreme Court of Nevada. The table of contents and statement of issues presented for review of that

opening brief are reproduced herein (Resp. App. C). Petitioner merely noted Judge Guinan's recusal due to "bias" (Resp. App. C, 21a), but no argument was made based on petitioner's complaint to the Judicial Discipline Commission, Judge Guinan's recusal of himself or his "bias."[1] Nor was any claim made of denial of due process of law under the federal constitution. On March 18, 1981, respondents' brief was filed with the Supreme Court of Nevada and, on or about May 18, 1981, petitioner's reply brief was filed with the Supreme Court of Nevada. Again, no mention was made of the issues petitioner seeks to raise here. Petitioner argued in her reply, inter alia, "The only issue before this Court on the review of this second appeal is whether the trial court followed the appellate directions and mandate" (Resp. App. D, 26a). Oral argument was held before the Supreme Court of Nevada on October 14, 1981. No mention was made of the points petitioner seeks to raise here. The Supreme Court reserved decision.

On May 12, 1982, the Supreme Court of Nevada unanimously affirmed the judgment of the District Court and held that at the time of decedent's death all of his assets were separate property. This decision of the Supreme Court of Nevada is reported at *Cord v. Cord*, 98 Nev. 210, 644 P.2d 1026 (1982), and is appended hereto (Resp. App. E).

The Petition for Reargument

On May 27, 1982, petitioner sought a rehearing of the Supreme Court's decision. For the first time, more than 16 months after learning of Judge Guinan's "bias," and only 15 days after all other arguments had failed, petitioner raised before the Supreme Court of Nevada the point of Judge Guinan's "bias."

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1 As is demonstrated below in Point I of the Reasons for Denial of the Writ, the bias acknowledged by Judge Guinan is not legally cognizable because it is not extrajudicial. Accordingly, the term "bias" in referring to Judge Guinan is placed in quotation marks to maintain this distinction.

In the petition for rehearing, petitioner argued two points: first, that the Supreme Court's affirmance "rests upon a factual foundation which is absolutely wrong and simply not true"; second, the decision below was made and entered after Judge Guinan "admittedly possessed an actual bias against counsel . . . ." That portion of petitioner's brief seeking a rehearing and dealing with the "bias" point is reproduced in full (Resp. App. F, 35a-37a). In opposition to the petition for rehearing, respondents argued that the Rules of the Supreme Court of Nevada, NRAP 40(C)(1), did not allow points to be raised for the first time in a petition for rehearing, that petitioner had every opportunity to raise this point before the court in the initial hearing but consciously elected not to do so and that there was no showing of "bias" at the time the trial court rendered its judgment. That portion of respondents' brief advancing these points is reproduced herein (Resp. App. G, 40a-42a).

Rehearing was denied by the Supreme Court of Nevada on December 16, 1982 (Pet. App. E). The time to petition this Court for a writ of certiorari from that final decision of the Supreme Court of Nevada expired on or about March 16, *1983*. No such petition for a writ was filed. Consequently, as argued below, it is respondents' position that the present petition is not timely brought and that it would be beyond this Court's jurisdiction for it to issue a writ of certiorari to review the effect of the "bias" of the District Court upon that final judgment.

Respondents' Application for a Writ of Prohibition

Having exhausted all appeals to the Supreme Court of Nevada, on February 28, 1983, petitioner resorted to the District Court to the newly assigned District Judge. She filed two motions before that court: first, a motion to set aside the judgment of the District Court entered November 5, 1980, as a void judgment because of Judge Guinan's "bias" (Resp. App. H); and second, a motion to restrain respondents from distributing the assets of the estate to the residuary beneficiaries, until determination of the first motion.

On March 22, 1983, in reply to petitioner's District Court motions, respondents sought from the Supreme Court of Nevada a writ of prohibition preventing the District Court from considering petitioner's motions, asserting that the District Court was acting in excess of its jurisdiction, primarily because petitioner had waived and was estopped to claim at that late date that the judgment of the District Court was void.

Subsequently, on December 22, 1983, the Supreme Court of Nevada granted the writ of prohibition directing the District Court to dismiss petitioner's motions (Pet. App. F). The order of the Supreme Court of Nevada is unreported and appended to the petition (Pet. App. C).

On January 6, 1984, petitioner again sought a rehearing by the Supreme Court of Nevada but rehearing was denied on February 15, 1984 (Pet. App. E).

On May 7, 1984, petitioner filed the present petition for a writ of certiorari arguing that the alleged bias of the District Court Judge rendered the judgment against her void and denied her due process of law under the Fourteenth Amendment of the United States Constitution.

REASONS FOR DENIAL OF THE WRIT

I.

THE ADMITTED "BIAS" WAS NOT EXTRAJUDICIAL: NO DUE PROCESS RIGHTS WERE DENIED

There has been no judicial determination below that the "bias" of the trial court did or did not impinge upon petitioner's due process rights. Thus, the Supreme Court of Nevada has *not* decided a federal question of substance, either undecided by this Court or inconsistent with this Court's decisions. Accordingly, the petition should be denied. Sup. Ct. R. 19(1)(a). However, it is clear from the decisions of this Court that the acknowledged "bias" of the trial court is not of such a nature as to render the underlying judgment void.

It is without dispute that the fifth and fourteenth amendments provide litigants the right to a fair trial before a neutral and detached judge; yet, bias sufficient to constitute a violation of due process has been found only in extraordinary circumstances not present here. *E.g.*, *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (a denial of due process for a village mayor, with substantial governmental financial responsibilities, to sit as a judge where a substantial portion of the village revenues derive from the fines he imposes); *In re Murchison*, 349 U.S. 133, 136 (1955) (a denial of due process for a judge to sit as a "one-man grand jury" and subsequently act as prosecutor and judge of contempt charges before such grand jury). Other instances are cited in *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-50 & n.2 (1980) and *Withrow v. Larkin*, 421 U.S. 35, 46-47 & nn.14-15 (1975).

In both federal and state systems, the right to a fair trial before an impartial judge is safeguarded by statutory protection, 28 U.S.C. §§ 144, 455 (1976 & Supp. IV 1980); Nev. Rev. Stat. §§ 1.230, 1.235 (1983) (Resp. App. I).[2] Although this constitutional right exists apart from statutory disqualification provisions, *see United States v. Sciuto*, 531 F.2d 842, 845 (7th Cir. 1976), any bias that would violate the due process clause would more readily violate the statutes. *In re International Business Machines Corp.*, 618 F.2d 923, 932 n.11 (2d Cir. 1980) (holding rejection of bias claim under 28 U.S.C. § 144, 455, a fortiori, defeats constitutional due process claim); *United States v. Haldeman*, 559 F.2d 31, 130 n.276 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *United States v. Conforte*,

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2 The Nevada procedure for disqualification of a judge is essentially the same as the federal procedure. It provides for the filing with the judge of an affidavit specifying the facts upon which such disqualification is sought and an attorney's certificate that the affidavit is filed in good faith and not interposed for delay. In the case at bar, petitioner filed neither the affidavit nor certificate despite her attorney's intemperate and unsupported allegations on January 16, 1981 that Judge Guinan's bias "began six years ago and continued throughout the entire proceedings" (Pet. App. B).

457 F. Supp. 641, 659 n.13 (D. Nev. 1978) (rejecting separate consideration of fifth amendment due process and fair trial claims where bias held insufficient to support disqualification under 28 U.S.C. §§ 144, 455), *aff'd*, 624 F.2d 864 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980). Because a greater evidentiary showing of bias is necessary to support a constitutional due process claim than a statutory bias claim, failure to produce evidence of bias sufficient to support a statutory bias claim will accordingly dispose of the constitutional claims. *Id.*

Under either federal constitutional law or statutory law, however, the "bias" acknowledged by the trial court here is insufficient to have prejudiced petitioner's rights to a fair trial. The "bias" acknowledged was not extrajudicial but arose in the context of trial and developed only after the judge had stated his decision.

Mr. Justice Douglas stated the governing law:

> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). *Accord United States v. Kelley*, 712 F.2d 884, 889 (1st Cir. 1983); *In re International Business Machines Corp.*, 618 F.2d at 927, 932; *United States v. Conforte*, 624 F.2d 869, 881 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980); *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1051-52 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

Thus, a two part test has been long established and followed. Petitioner can satisfy neither half: as to the requirement that the judge's decision "result in an opinion on the merits on some basis other than what the judge learned from his participation in the case," petitioner neither attempts to nor can she make such showing. Two facts are conclusive against petitioner; first, as shown, on July 2, 1980, some three and one-half months prior to learning of the complaint which led

to the judge's subsequent recusal, the court announced its decision. Thus, there is nothing to demonstrate that the decision was influenced by "bias." Second, the Supreme Court of Nevada, upon appeal, closely scrutinized the trial record and unanimously affirmed the District Court's decision based solely upon the trial record. Even in the face of charges of "bias" by the trial court, the Supreme Court denied a rehearing, thus reaffirming the decision below as fully substantiated by the trial record.

As to the second requirement that the source of the bias be extrajudicial, the record unequivocally shows that the "bias" arose solely from the single instance of the complaint made by petitioner's counsel about delay by the court in issuing its opinion (Pet. App. B). Similar complaints have not been recognized as grounds for disqualification of judges nor for upsetting their judgments. *Wilks v. Israel*, 627 F.2d 32, 36-38 (7th Cir. 1980), *cert. denied*, 449 U.S. 1086 (1981); *United States v. Bray*, 546 F.2d 851, 857-59 (10th Cir. 1976) (and cases cited therein).

Several courts have recognized that in the exceptional case, in which a judge's animus against counsel becomes "virulent," *Kelley*, 712 F.2d at 890 (and cases cited therein), a claim of bias may be premised on counsel's trial conduct. However, great caution must be exercised in such cases to avoid giving "lawyers, once in controversy with a judge, . . . a license under which the judge would serve at their will." *Davis*, 517 F.2d at 1049-50. *Accord Conforte*, 457 F. Supp. at 652. The circumstances which justify recusal are premised on longstanding and dramatic controversies between a judge and litigant that depend on antagonism wholly unrelated to the matter on trial. *See Bell v. Chandler*, 569 F.2d 556, 559 (10th Cir. 1978); *United States v. Ritter*, 540 F.2d 459 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976).

None of these aggravated circumstances are present here and petitioner does not argue otherwise.

Where, as here, the attorney has already been informed that she has lost her case, it would be manifest injustice to permit an attorney's *subsequent* provocative conduct to provide grounds for undoing a *prior* decision on the ground of bias. *See, e.g., Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982); *Coastal Petroleum Co. v. Mobil Oil Corp.*, 378 So. 2d 336, 337 (Fla. Dist. Ct. App.), *cert. denied*, 386 So. 2d 635 (1980).

In sum, petitioner has failed to show even a colorable claim of denial of due process of law stemming from "bias" of the trial court. For that reason alone, this case does not warrant review by this Court and the petition should be denied.

II.

THIS PETITION HAS NOT BEEN TIMELY FILED WITH THIS COURT

As a threshold matter, because petitioner failed to file a petition for writ of certiorari within 90 days after the entry of the December 16, 1982 final judgment of the Supreme Court of Nevada denying rehearing, the time allowed for filing a petition for certiorari from that judgment has long since expired. The decisions of this Court hold that, pursuant to 28 U.S.C. § 2101(c), an untimely petition in a civil case must be denied "for want of jurisdiction." *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942). *Accord Deal v. Cincinnati Board of Education*, 402 U.S. 962 (1971) (court denied certiorari in civil case in which petition for certiorari filed one day late); *Matton Steamboat Co. v. Murphy*, 319 U.S. 412 (1943); *Citizens Bank v. Opperman*, 249 U.S. 448, 450 (1919).

As the December 16, 1982 judgment of the Supreme Court of Nevada "fully adjudicated rights and that adjudication [was] not subject to further review by a state court," it was a final judgment which triggered the running of the limitations period. *Department of Banking*, 317 U.S. at 268. Although the

running of the limitations period may be tolled by a timely petition directed to the court whose judgment is being challenged, such as a petition for rehearing or motion to amend judgment, such tolling has been permitted only on direct review, not on collateral attack in a different court, as petitioner attempted here. *Department of Banking*, 317 U.S. at 266-67; *United States v. Adams*, 383 U.S. 39, 41-42 (1966); *United States v. Healy*, 376 U.S. 75, 77-80 (1964).

Moreover, petitioner's motion to vacate the judgment of Judge Guinan brought in the district court after petitioner's appeal had been denied by the Supreme Court of Nevada, was a mere restatement of her position in the petition for rehearing and thus would not have tolled the limitations period even if it had been pursued on direct review before the Nevada highest Court. As stated in *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952), "If the court did no more by the second judgment than to restate what it had decided by the first one . . . the 90 days would start to run by the first judgment." *Id.* at 20. *Accord FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952).

The only attempt, an inadequate one at that, by petitioner to expressly raise a constitutional issue before the Supreme Court of Nevada was by her petition for rehearing filed with that Court on May 26, 1982 (Pet. App. D). That Court rejected that argument. Petitioner should have, but did not, petition for a writ of certiorari by March 16, *1983*. Such failure deprives this Court of jurisdiction to review that final judgment of the Supreme Court of Nevada. *Deal*, 402 U.S. at 962; *Department of Banking*, 317 U.S. at 268.

Notwithstanding, respondents recognize that the proceeding instituted by them before the Supreme Court of Nevada seeking, and obtaining, a writ of prohibition is a separate and distinct suit and that the judgment therein is a final judgment. *Rescue Army v. Municipal Court*, 331 U.S. 549, 565-68 (1947); *Ex parte Poresky*, 290 U.S. 30, 31 (1933); *Bandini Petroleum*

Co. v. Superior Court, 284 U.S. 8, 14 (1931). *Cf. Costarelli v. Massachusetts*, 421 U.S. 193, 198 (1975). That final judgment was entered December 22, 1983, and after denial of a petition for rehearing on February 15, 1984, petitioner timely filed the present petition from the latter judgment. However, in deciding whether to grant the present petition this Court is confined to the record made before the Supreme Court of Nevada in the distinct writ of prohibition suit. *Bandini Petroleum*, 284 U.S. at 14. Further, in exercising its discretion, all other requirements of Supreme Court jurisdiction must be satisfied. *Hammerstein v. Superior Court*, 341 U.S. 491 (1951); *Rescue Army*, 331 U.S. at 565-75. As shown, these requisites are not met and the petition should be denied.

III.

IN THE COURT BELOW NO FEDERAL QUESTION WAS PROPERLY OR SEASONABLY RAISED OR PRESERVED, NOR WAS A FEDERAL QUESTION DECIDED

In seeking review before this Court, petitioner ignores fundamental principles governing this Court's jurisdiction: the final judgment sought to be reviewed must reflect a substantial federal question that has been properly raised and necessarily decided in the state court proceedings. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

A. Petitioner Failed to Present Any Federal Claim to the State Court With Fair Precision and in Due Time

Throughout proceedings below, including the final petition for rehearing, petitioner did not cite nor rely upon the due process clause of the Constitution or a single case decided thereunder by this Court. Petitioner states in her petition (Pet. at 6) that the federal question in this case was raised in three papers below: namely, her motion under NRCP 60(b)(3) to vacate the judgment of November 5, 1980 (Resp. App. H); her

opposition to respondents' petition for a writ of prohibition (Resp. App. J); and her petition for rehearing on grant of the writ (Pet. App. D). But examination of these papers reproduced herein, demonstrates that petitioner sought to invalidate the judgment below solely on the basis of state law. When respondents sought the writ of prohibition, petitioner opposed issuance of that writ exclusively on state law grounds.

The Supreme Court of Nevada granted the writ of prohibition, holding that the district court lacked jurisdiction to hear petitioner's motions. As a matter of Nevada law, the Supreme Court held that petitioner's motions were barred by estoppel, waiver and the statutory requirement that they be "brought within a reasonable time" citing exclusively (with one exception[3]) prior decisions of that court and Nevada rules of procedure.

Where a state attaches reasonable time limits to the assertion of rights, the litigant's failure to follow such limitations will generally foreclose Supreme Court review. *In re Lamkin*, 355 U.S. 59 (1957); *Michel v. Louisiana*, 350 U.S. 91, 97 (1955). For example, it has been held that where the federal constitutional issue was not raised in the trial court but raised for the first time in petition for rehearing at the appellate level, the highest state court's refusal without opinion to hear the case precludes review on certiorari by the Supreme Court. *Stembridge v. Georgia*, 343 U.S. 541 (1952). A waiver has also been found where a litigant failed to list federal issues among the assignment of errors on appeal. *Beck v. Washington* 369 U.S. 541, 553 (1962).

Since the state procedures of Nevada provide a more than reasonable opportunity for the presentation of a challenge to the fundamental fairness of a trial (which petitioner chose not

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3 The one exception, *United States v. Conforte*, 624 F.2d at 879, was a holding under the comparable federal civil rules and also did not resolve a constitutional issue.

to utilize), the federal question petitioner asserts here was not properly raised and this Court should deny the writ.

Similarly, petitioner's attempt to raise a federal question in her petition for rehearing below came too late to satisfy Nevada rules governing review of issues on a petition for rehearing. *Cf. Stembridge*, 343 U.S. at 547. The rehearing was denied by the court, citing NRAP 40(c)(1), which provides in part that "no point may be raised for the first time on rehearing" (Pet. App. E).

When, as here, the federal question is not raised until a petition for rehearing, the decision of the state's highest court is impervious to Supreme Court review. *See Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); *Forbes v. State Council*, 216 U.S. 396 (1910). A petition for rehearing simply is not "part of the record on which judgment rests." *Simmerman v. Nebraska*, 116 U.S. 54, 55 (1885).

Although petitioner's failure to raise a timely federal question below, alone, is dispositive of her petition here, even once raised the constitutional due process issue was inadequately presented to preserve it for this Court's review. "[T]he jurisdiction of this Court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place beyond question that the party bringing a case here from such court intended to assert a federal right." *Oxley Stove Co. v. Butler County*, 166 U.S. 648, 655 (1897). *See also Herndon*, 295 U.S. at 442-43 (1935); *Harding v. Illinois*, 196 U.S. 78, 88 (1904).

Even when petitioner first attempted to raise a federal question, she failed to specifically state a distinctly federal right. For example, petitioner asserted "a serious infringement of the constitutional guarantee of due process" (Pet. App. D, A-10), a void judgment "in violation of due process" (Pet. App. D, A-10) and "a blatant constitutional violation of due process" (Pet. App. D, A-19), all claims which are cognizable

under the State of Nevada Constitution, Nev. Const. art. I, § 8, as well as under the United States Constitution.

Concededly, the instant petition seeks to raise federal constitutional questions. But, as this Court has held many times, the Supreme Court lacks jurisdiction to review a federal question raised for the first time in a petition for a writ of certiorari. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

B. The State Court Decision is Based on Adequate and Independent State Grounds

If, by some extraordinarily lenient construction of the requirements for adequately and seasonably stating a federal question, petitioner's assertion of such claim on her petition for rehearing were deemed sufficient, certiorari jurisdiction still would not lie. A review of a judgment of a state court will not be granted when based upon adequate and independent state grounds. *Illinois v. Grayson*, 421 U.S. 994 (1975); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908).

All of the controlling issues before the state court, and decided by the state court in this case, were on state grounds, not federal. Neither the opinion of the Nevada Supreme Court issuing the writ of prohibition nor its opinion denying rehearing contain any reference, expressly or by implication, to any claim based on the Constitution of the United States. The decision of the Nevada Supreme Court issuing the writ of prohibition was based entirely upon adequate and independent state grounds of estoppel, waiver and petitioner's failure to file a motion "within a reasonable time" as prescribed by the Rules of Civil Procedure, NRCP 60(b)(3) (Pet. App. C, A-6). The sole ground stated for denial of the petition for rehearing was NRAP 40(c)(1) (Pet. App. E). Under such circumstances there is no federal question subject to review.

Further, the decision of the Nevada Supreme Court issuing the writ of prohibition was based upon substantial evidence, in fact undisputed evidence, and was correctly decided.

Petitioner's citations for the proposition that a void judgment may always be attacked, regardless of waiver, estoppel or time limitations, are inapposite. If a party had an opportunity to make his claim or defense in a former action, it is elementary that res judicata principles preclude that party from relitigating issues that were raised or could have been raised in that former action. *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932). *See also Nevada v. United States*, 103 S. Ct. 2906, 2918 (1983); *Lester v. National Broadcasting Co.*, 217 F.2d 399, 400 (9th Cir. 1954) *cert. denied*, 348 U.S. 954 (1955); *Carter v. Stetson*, 601 F.2d 733 (5th Cir. 1979). Except for exceptional cases, such as want of notice or lack of opportunity to appeal, *e.g.*, *Blonder-Tongue v. University Foundation*, 402 U.S. 313, 329 (1971), full relief is available through the normal channels of review and collateral attack is barred. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). *American Surety* is apt. The petitioner challenged a judgment entered without notice and opportunity to be heard. A claim of denial of due process was raised for the first time upon a petition for rehearing before the Idaho Supreme Court and denied without opinion. *American Surety*, 287 U.S. at 167. This Court dismissed the writ for failure to seasonably assert the federal claim. *Id.* at 164. The Court's decision rested on a determination that there had been ample opportunity earlier to present the objection as arising under the fourteenth amendment rather than state law. *Id.* at 164, 165, 169.

In the case at bar, petitioner had an opportunity to attack the allegedly void judgment directly before the District Court and before the Supreme Court of Nevada on the initial appeal. Petitioner failed to do so. As this Court held in *American Surety*, and as the Nevada Supreme Court held, petitioner is estopped from asserting the voidness of the judgment.

Accordingly, the Nevada Supreme Court correctly based its decision on adequate and independent state grounds, presenting no federal question for this Court's review.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Nevada should be denied.

Dated: May 25, 1984

Respectfully submitted,

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APPENDICES

Appendix A

SECOND JUDICIAL DISTRICT COURT
WASHOE COUNTY
STATE OF NEVADA

JAMES J. GUINAN
DISTRICT JUDGE

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July 2, 1980

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Re: Cord v. Cord

Dear Miss Novakovich:

I have reached a decision in the case of Cord v. Cord in favor of the executors. Today I asked Mr. Bradley to prepare Findings, Conclusions, and Judgment because it has become apparent that I will not find time in the near future to write an opinion.

When Mr. Bradley has produced proposed Findings, Conclusions, and Judgment which are satisfactory to me, they will be submitted to you pursuant to Rule 8 of the Rules of Practice for the Second Judicial District Court of the State of Nevada before I take any final action on them.

Very truly yours,

James J. Guinan

JJG:lw

cc: William O. Bradley, Esq.

Appendix B

IN THE
SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

[Filed—'80 Nov. 5 P4:05—Judi Bailey, Clerk,
By: R. Strong, Deputy]

VIRGINIA KIRK CORD,

Plaintiff,

—vs.—

CHARLES E. CORD and EDWARD D. NEUHOFF, Co-Executors of the Estate of E. L. CORD, Deceased, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was remanded to this Court for trial to determine the extent of Plaintiff's community interest in the estate of E. L. Cord. The Supreme Court also instructed this Court to apply the Pereira method of apportionment in determining whether any of E. L. Cord's estate should be apportioned to the community.

Although it is the opinion of this Court that there is a distinction between investing one's separate property without taking an active part in any business or profession, which does not result in the creation of community property, see, e.g.,

Smith v. *Smith*, 94 Nev. 249, 578 P.2d 319 (1978), and taking an active part in one or more businesses or professions, which does result in the creation of community property, and that, therefore, there never was and is not now any community property in the estate of E. L. Cord, and that the Pereira rule does not apply, the following findings of fact and conclusions of law are made pursuant to the instructions of the Supreme Court.

The Court having considered all of the evidence, briefs and arguments of counsel now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. In accordance with the determination of the Nevada Supreme Court, and pursuant to stipulation by the parties, as of January 1, 1953, 88.4% of the total assets held by E. L. Cord was his separate property, and 11.6% of the assets was the community property of E. L. Cord and Virginia Kirk Cord, husband and wife.

2. The first trial of this case in September 1976, dealt with the affairs of the parties until 1953. This trial dealt with the affairs of the parties from January 1, 1953, through and including the date of E. L. Cord's death on January 2, 1974.

3. Plaintiff is a resident of Reno, Washoe County, Nevada, and is the widow of E. L. Cord, deceased, who died testate in Reno, Washoe County, Nevada, on January 2, 1974. The Defendants are the Co-Executors of the Estate of E. L. Cord. The assets which are the subject of this litigation consist of property in the Estate of E. L. Cord in which the Plaintiff seeks to establish a community property interest.

4. On the death of E. L. Cord, according to his financial statements for the year ending 1973, E. L. Cord's separate net worth had a book value of $11,406,083.00.

5. The Appraisement and Inventory in the Estate of E. L. Cord showed a market value of $39,251,149.00 as of January 2, 1974, the date of E. L. Cord's death.

6. E. L. Cord was a skillful and lucky investor, but expended only minimal time and effort in the supervision and investment of his separate property during the years 1953 through 1973. From January 1, 1953, until his death, E. L. Cord was a passive investor of his own separate funds. He acted as investment adviser for funds he had provided in trust for his wife, the Plaintiff, for funds he had provided for various trusts which he had created for the children of his first marriage and their children, and for funds which he had provided in trust for his children, the issue of his marriage to Plaintiff, and their children. If the minimal efforts of E. L. Cord contributed in any manner or to any extent to the increment in value of his separate estate, no evidence was presented by the Plaintiff attributing any value whatsoever to such minimal services rendered by E. L. Cord in connection with his separate property, except her conclusory testimony at the first trial that he worked hard, unsupported by any factual testimony.

7. E. L. Cord, from January 1, 1953, until his death, did not take an active part in any business. During that period, he invested his separate property. E. L. Cord did not devote any time, labor or skill to the production of income from any business that he invested in during that period, nor did he expend any time, energy or skill in the management or operation of any real property that he owned during that period.

8. During the period January 1, 1953, through December 31, 1973, and up to the date of E. L. Cord's death, January 2, 1974, E. L. Cord's investments were carried on in several separate and distinct legal entities, such as corporations, partnerships, sole proprietorships, and under fictitious names. In each instance, each entity was treated as a separate entity, with complete books and records maintained to reflect the results obtained by each entity. All of these records were maintained to reflect the property as the separate property of E. L. Cord.

9. Between January 1, 1953, and his death, E. L. Cord made gifts to immediate members of the Cord family and others of $3,391,774.00 book value, and in each instance, the Plaintiff joined in consenting to such gifts. E. L. Cord also paid gift taxes of $1,805,113.00. In Defendants' accountings, these gifts and gift taxes were charged to community family expenses. These gifts should be allocated in the following manner: (1) gifts to blood relatives of Plaintiff and E. L. Cord should be allocated as community expenses; (2) gifts made by E. L. Cord to Plaintiff and her blood relatives, who were not also blood relatives of E. L. Cord, should be allocated as community expenses; and (3) gifts made by E. L. Cord to his blood relatives, who were not also blood relatives of Plaintiff, and to close friends and business associates should be allocated to E. L. Cord's separate property.

10. During the period from January 1, 1953, until his death, E. L. Cord paid $4,980,861.00 in income taxes on behalf of himself and Plaintiff. The income taxes, including income taxes paid by E. L. Cord on Plaintiff's income should be allocated each year ratably based upon the nature of the income as community or separate.

11. From 1953 until his death, E. L. Cord and Plaintiff spent E. L. Cord's money lavishly for family expenses. They maintained residences in California, Nevada, Florida and New York. The decedent owned a Beverly Hills residence in California consisting of several acres of land and a large house. He employed servants at this residence, as well as his other places of residence, which the decedent and Plaintiff maintained. From January 1, 1953, until the date of death of E. L. Cord, the community expenditures for the living expenses of E. L. Cord and Plaintiff and their family, excluding income taxes, gifts, and gift taxes, was the sum of $3,246,593.00, and this amount substantially exceeded community income, which excess should be charged against the community equity, if any, existing at the time of E. L. Cord's death. During this period, E. L. Cord believed that all his funds and property were his sole and separate property. At no time did E. L. Cord con-

sciously choose to pay for community living expenses out of his separate property as distinguished from community property, nor did E. L. Cord at any time consciously decline to use any residual community holdings to pay for community living expenses. E. L. Cord by paying from his separate property the excess of family living expenses over and above community income did not intend to make a gift of this amount to the community.

12. At the time of the death of the decedent, E. L. Cord, Plaintiff had assets in various trust accounts of approximately $8,000,000 provided her by the decedent, E. L. Cord. In addition, E. L. Cord created trusts for his children and grandchildren with a book value at the time of his death in the amount of $8,771,349.00. From 1953 until the time of his death, E. L. Cord made gifts of his separate property to the various trust accounts for Plaintiff and his children and grandchildren of various assets which were in most instances identical to items in which he invested his own separate property, including stock in Superior Oil Company, stock in the Honolulu Oil Company, and other publicly-traded stocks.

13. Comprehensive accounting testimony and exhibits were introduced by both parties during the trial of this case, tracing all of E. L. Cord's financial transactions during the period January 1, 1953, through January 2, 1974. The accounting exhibits and testimony of the expert accounting witnesses produced by the Defendants were more credible. The accounting testimony and exhibits presented by Defendants were prepared using generally accepted accounting principles and accurately depict a year-by-year analysis of the financial activities of E. L. Cord and Virginia K. Cord, which is consistent and persuasive.

14. The Court finds the accounting evidence presented by Plaintiff to be less credible.

15. The treatment by Plaintiff's experts of the unrealized gain between a book value on December 31, 1973, of $11,406,083.00 and a market value as of the time of E. L. Cord's death of $39,251,149.00 by attributing the sum of $1,585.191.00 to each of the years 1953 through 1974, is fictitious and unsupported by any evidence or rule of law in determining whether income and capital gains, realized or unrealized, are separate or community property. This treatment ignores the character of assets as separate property or community property, the source of gain, and whether any work, labor, or skill was expended by E. L. Cord to enhance the income or value of his separate property, and attributes gain without evidence that it accrued in any given year.

16. The preponderance of the evidence establishes that the increment in value of E. L. Cord's separate property was the result of increases in value due to inflation, natural enhancement of his investments, general economic conditions, capital gains generated by good corporate management of publicly-owned corporations in which he had invested, increases in value and profit generated by competent employees and managers employed by E. L. Cord to operate his separate properties, and increases in land values. The increase in the value of the real property of Pan-Pacific Auditorium, Inc., particularly, was due to general economic conditions and inflation in the Los Angeles area, rather than being the result of any time, effort or skill of E. L. Cord.

17. Various assets listed below and contained in the Inventory of the Estate of E. L. Cord at the time of his death were assets acquired by E. L. Cord when no community property existed, and E. L. Cord did not thereafter devote any of his time, effort or skill in the management thereof. These assets were his sole and separate property and no part of the profit, gain or increment in value of these assets are apportionable to the community. The following assets come within this category:

A. *The Circle L. Ranches, consisting of the Dyer Ranch in Esmeralda County, Nevada; the Lovelock Ranch, in Pershing County, Neveda; and the Jiggs Ranch, in Elko County, Nevada, which were acquired in the early 1940's*

These assets, acquired in the years when no community property existed, had a book value of $1,357,684.00 and an appraisal value of $6,539,899.00. These ranch assets were acquired and held by E. L. Cord, and he expended no community time, effort or skill in their management, but had them managed by others who were adequately compensated for their services from the separate property of E. L. Cord. The yearly ranch operations consistently lost money. No portion of the increment in their value is allocable to the community.

B. *Superior Oil of California Stock, which was acquired in 1940 and 1941.*

This stock was purchased by E. L. Cord with his separate property, and held by him until his death. The evidence showed he had no part in the management of the company and that it was a publicly-traded stock in which he invested his separate funds. The book value of the stock on December 31, 1973, was $37,795.00. The Inventory and Appraisement value was $3,740,616.00. No part of this gain is attributable to E. L. Cord's efforts, and it is solely a profit of his separate property. No part is allocable to the community.

C. *Santa Anita Consolidated, Inc. Stock, which was acquired in 1934.*

E. L. Cord bought this stock in 1934, when no community property existed and while living in a non-community state, and held it until his death. The book value on December 31, 1973, was $7,641.00. The Inventory and Appraisement value was $149,547.00. This is simply an externally generated increment in value to his separate property. There was no community efforts or activities by E. L. Cord regarding this asset

throughout his marriage to Plaintiff and until his death. This incremented gain is wholly allocable to E. L. Cord's separate property.

18. The total increment in value or gain to E. L. Cord's separate property from the assets listed in Finding No. 17 above is $9,026,942.00. All such increment is shown by substantial evidence to be attributable to external economic factors and not to any community effort expended by E. L. Cord. No part of this increment or gain is community property.

19. Between January 1, 1953 and his death in 1974, E. L. Cord sold assets which he had acquired in years when no community property existed, or when the parties were domiciled in non-community property states. The gains realized from these sales are the profits of E. L. Cord's separate property, and no part of these gains is attributable to any time, labor or skill devoted by E. L. Cord to these assets.

Date Acquired	*Item*	*Year Sold*	*Gain/(Loss)*
1927-1946	Chicago Electric Co. Class A stock	1953	$262,884.00
1933-1945	Chicago Electric Co. Class B stock	1953	566,599.00
1936-1938	Black Mammoth Consolidated Mining Co. stock	1953	(307,444.00) (Loss)
1946	Office building at 9754-56 Wilshire Blvd. in Beverly Hills, California	1955	227,406.00
1933	Los Angeles Broadcasting Co. (liquidation of corporation and distribution of assets)	1956	663,749.00

Date Acquired	*Item*	*Year Sold*	*Gain/(Loss)*
1944	Honolulu Oil Corporation stock, as a liquidating dividend on sale of the corporate assets	1961	1,260,550.00
1931	Real estate, 500 Doheny Rd. in Beverly Hills	1962	126,282.00
1933	Los Angeles Broadcasting Co., KFAC Radio	1963	1,796,032.00
1943	Real estate, 3725 Chesapeake Ave., Los Angeles (installment sale)	1963	281,893.00
1943	Real estate, 3725 Chesapeake Ave., Los Angeles (installment sale)	1964	696,902.00
1934	Santa Anita Consolidated Inc., stock	1965	111,127.00
1936	Capital L, Inc., stock (represents interest in 3 parking lots)	1970	572,623.00
1940-1941	Superior Oil Co. stock 100 shares	1973	252,159.00
TOTAL GAIN to Separate Property.....			$6,510,762.00

The Court finds that these gains are all the rents, issues and profits of E. L. Cord's separate property, and no part thereof is apportionable to the community.

20. Between 1953 and 1962, E. L. Cord purchased with his separate funds a partnership interest in certain uranium mining claims and purchased certain land scrip issued by the United

States Government. The complete management of these investments was turned over by E. L. Cord to his associate and attorney, Edward D. Neuhoff. Mr. Neuhoff's efforts and activities produced a net profit on the sale of these assets in the combined amount of $6,879,893.00. There was no time, labor or skill devoted by E. L. Cord which contributed in any way to the enhancement in value of these assets at the time of their sale in the years 1957 through 1971. The gains realized from these assets constitute the rents, issues or profits of E. L. Cord's separate property and should be allocated entirely to his separate estate in the year or years in which the gains were realized.

21. The separate property of E. L. Cord is entitled to be credited with the sum of $5,830,864.00 for expenditures for community expenses made in years when community assets were exhausted.

22. The separate property of E. L. Cord is entitled to be credited with the sum of $14,250,931.00 representing the unrealized increment to separate property due under the application of the 7% Pereira formula.

23. There was no community property in existence at the time of E. L. Cord's death on January 2, 1974.

24. The plaintiff did not take the witness stand to testify during the course of the second trial. However, counsel for Plaintiff offered excerpts from the record of Plaintiff's testimony during the first trial. This Court had the opportunity to observe Plaintiff on the witness stand during the first trial, and finds that her testimony was evasive, unresponsive and incredible in many respects.

25. In 1953, Plaintiff had assets provided for her by E. L. Cord of approximately $2,000,000.00 and that at the date of E. L. Cord's death, Plaintiff had assets of approximately $8,000,000.00 in trusts for her benefit provided for her by E. L. Cord.

26. At the time E. L. Cord created the separate property estate of Plaintiff, he did so in reliance upon the mutual understanding of the parties that all of the property owned by him was his separate estate, and further he so believed and relied when he provided for her in his Will, all to his injury and the detriment of his separate estate. Mrs. Cord knew that Mr. Cord so believed and relied on the fact that said property was his separate property when he made said lifetime and testamentary gifts to her, and that he so believed until his death, and she accepted such gifts on that basis.

27. From July 13, 1953, until his death, E. L. Cord believed and understood that all of the property now inventoried in the Estate of E. L. Cord was his sole and separate property. E. L. Cord never represented to his wife otherwise, and she prior to his death never claimed otherwise. The first assertion she made that his said estate or any part thereof was community property after July 13, 1953, was after his death.

28. In his Will, the decedent, E. L. Cord, made specific bequests to the Plaintiff of his residence in Reno, Nevada, including all of the household furnishings therein, all of the household furnishings of the Circle L. Ranch at Dyer, Nevada, and $500,000 in cash, having a total value of $1,344,305.00. These bequests were distributed to the Plaintiff upon her petition for distribution, by the executors of the decedent's estate, after obtaining the court's approval for such distributions. The bequests were accepted by the Plaintiff and she took possession of and occupied the property so bequeathed and has utilized and retained the benefits thereof.

29. In accordance with the opinion of the Nevada Supreme Court, including Footnote No. 4 thereof, a careful year-by-year analysis of E. L. Cord's assets was made and put into evidence by Defendants. Such analysis included, at the end of each year from January 1, 1953, until January 2, 1974, a valuation of all of the assets of E. L. Cord, any increase in the asset value caused by natural enhancement, economic and inflation factors, any increases as a result of a sale, the

addition of a 7% simple interest or credit to his separate property as contemplated by the Pereira case, and his time, effort and labor, if any, devoted to his separate property. By utilizing such year-by-year analysis, the Court finds that the evidence in this case establishes that no part of the estate left by E. L. Cord at his death sould be apportioned to community property, and all of the estate left by E. L. Cord was the separate property of E. L. Cord. E. L. Cord's separate property investments and assets valued at the end of each year at his book cost, plus simple interest allowed thereon each year until the date of his death, at the 7% Pereira formula rate, plus natural enhancement in value, exceeded the appraised value of his separate properties as of the date of his death on January 2, 1974, and no part of the assets of the decedent's estate is allocable to the community.

30. Defendants' accounting exhibits and testimony for the period 1953 through 1973 in evidence included therein income and gains derived from E. L. Cord's separate property, as well as any community income. Whether such income and gains are attributed to separate or community property, there was no community property existing at the date of E. L. Cord's death.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. All of the estate and assets left by E. L. Cord at the time of his death were the separate property of E. L. Cord;

2. On the date of the death of E. L. Cord there was no community property;

3. The separate assets owned by E. L. Cord upon his death represent his investment cost, plus natural enhancement in value, and incremented value due to inflation and economic factors, plus a 7% simple interest or Pereira credit thereon computed on the book value of his separate property at the end of each year;

4. None of the increase in value of E. L. Cord's separate assets is the product or result of more than minimal time and effort expended by E. L. Cord during the period from January 1, 1953, to the date of his death;

5. By reason of the fact that all of the assets of E. L. Cord at the time of his death were the separate property of E. L. Cord, any increment in the value of said property since the date of his death to date is also separate property of E. L. Cord and none of it is community property.

From the foregoing Findings of Fact and Conclusions of Law, the Court concludes that Plaintiff is not entitled to any relief by her complaint and that the same should be dismissed and that the Defendants are entitled to a Judgment declaring and decreeing that all of the assets of E. L. Cord, deceased, and any and all increments thereto are the separate property of E. L. Cord.

Let a Judgment be entered accordingly.

DATED this 5th day of November, 1980.

/s/ James L. Guinan
District Judge

IN THE
SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

[Filed—'80 Nov. 5, P4:06—Judi Bailey, Clerk,
By: R. Strong, Deputy]

VIRGINIA KIRK CORD,

Plaintiff,

vs.

CHARLES E. CORD and EDWARD D. NEUHOFF, Co-Executors of the Estate of E. L. Cord, deceased, et al.,

Defendants.

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing by her action and that the action is dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants are awarded their legally taxable costs of this action.

DATED this 5th day of November, 1980.

/s/ James L. Guinan
District Judge

Appendix C

Civil No. 13040

IN THE SUPREME COURT
OF THE STATE OF NEVADA

VIRGINIA KIRK CORD,

Appellant,

vs.

EDWARD D. NEUHOFF and CHARLES E. CORD as Co-Executors of the Estate of E. L. CORD, also known as ERRETT L. CORD and ERRETT LOBBAN CORD, deceased,

Respondents.

APPELLANT'S OPENING BRIEF

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Appendix C

Civil No. 13040

IN THE SUPREME COURT
OF THE STATE OF NEVADA

VIRGINIA KIRK CORD,

Appellant,

vs.

EDWARD D. NEUHOFF and CHARLES E. CORD as Co-Executors of the Estate of E. L. CORD, also known as ERRETT L. CORD and ERRETT LOBBAN CORD, deceased,

Respondents.

APPELLANT'S OPENING BRIEF

ISSUES PRESENTED FOR REVIEW

1. The trial court committed error in not adhering to the *law of the case* as stated in *Cord v. Neuhoff, et al.*, 94 Nev. 21 (1978).

2. The trial court committed error in holding that E. L. Cord as of January 1, 1953 and thereafter devoted only minimal effort to the management of his wealth.

3. The trial court committed error in its failure to make an annual apportionment of income from and increments in value of the property holdings of E. L. Cord as instructed by the Supreme Court and in not utilizing the *Pereira* formula as mandated in *Cord v. Neuhoff, et al.* (supra).

4. The trial court erred in holding there was no community property at the time of E. L. Cord's death in 1974.

5. The trial court committed error in holding listed parts of E. L. Cord's property holdings ceased to be part of the corpus of his investment business and became separate businesses and separate investments and in not applying the doctrine of estoppel to respondents.

6. The trial court committed error in holding gifts to Mrs. Cord and her blood relatives made by Mr. Cord were chargeable to the community estate and not to E. L. Cord's separate estate.

7. The trial court committed error in holding the community estate of E. L. Cord had to reimburse the separate estate for separate property used to pay family expenses.

8. The trial court committed error in giving some effect to the post nuptial contract held null and void by the Supreme Court on the first appeal of this case.

9. The trial court committed error in making findings irrelevant to the issues before the court.

* * * * *

On December 1, 1980, in his chambers, Judge Guinan advised counsel for respondents and appellant that he was withdrawing from this case and In the Matter of the Estate of E. L. Cord, Case No. 292073 In the Second Judicial District Court upon the ground that he had an actual bias against appellant's counsel.

* * * * *

Appendix D

Civil No. 13040

IN THE SUPREME COURT
OF THE STATE OF NEVADA

VIRGINIA KIRK CORD,

Appellant,

vs.

EDWARD D. NEUHOFF and CHARLES E. CORD, as Co-Executors of the Estate of E. L. CORD, also known as ERRETT L. CORD and ERRETT LOBBAN CORD, deceased, and Individually,

Respondents.

APPELLANT'S REPLY BRIEF

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VIII

ON REVIEW OF A SECOND APPEAL, THE ONLY ISSUE IS WHETHER TRIAL COURT FOLLOWED THE APPELLATE MANDATE AND DIRECTIONS

The only issue before this Court on the review of this second appeal is whether the trial court followed the appellate directions and mandate. *Genuine Parts Co. v. Garcia*, 582 P.2d 1270 (1978).

* * * * *

Appendix E
98 Nev. 210, 644 P.2d 1026 (1982)

SUPREME COURT OF NEVADA

May 12, 1982

No. 13040

Virginia Kirk CORD,

Appellant,

v.

Charles E. CORD and Edward D. Neuhoff, Co-Executors of the Estate of E. L. Cord, aka Errett L. Cord, aka Errett Lobban Cord, deceased, and individually,

Respondents.

Widow appealed from a judgment of the Second Judicial District Court, Washoe County, James J. Guinan, J., which declared all assets from estate of decedent to be separate property. The Supreme Court held that: (1) where Supreme Court's decision on first appeal between parties was premised upon the parties' involvement in a postnuptial agreement, and where Court considered only evidence relating to decedent's financial activity from 1937 to 1953 when it found that decedent had devoted great time and energy to management of his wealth whereas financial matters at issue in instant appeal, as well as factual circumstances surrounding them, involved years 1953 to 1974, doctrine of law of the case was not violated by lower court in its ruling that decedent expended only minimal time and effort in supervision and investment of his separate property during years 1953 to 1974, and (2) where decedent never made a conscious choice to use his separate property,

rather than available community property, to pay community expenses, since decedent's expenditures for community expenses were made while operating under erroneous assumption that parties' postnuptial agreement was valid and that all his funds were his separate property, decedent's separate property was entitled to reimbursement for expenditures for community expenses after community assets were exhausted.

Affirmed.

OPINION

PER CURIAM:

Virginia Cord appeals from a judgment declaring all assets from the estate of E. L. Cord to be separate property. This represents the second appeal between the parties.

In the initial case of *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978), we held a post-nuptial agreement between Mr. and Mrs. E. L. Cord invalid. We reversed and remanded the case for the district court to determine whether any of E. L. Cord's estate should be apportioned as community property.

On remand, the parties stipulated that from 1937 to 1953, 11.6 percent of E. L. Cord's separate holdings constituted community property. The parties entered into this stipulation based on footnote number four in *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978).[1] Consequently, the scope of trial was

1 "4 The financial records before the court, 1937 to 1953, are revealing in this regard. A year-by-year Pereira analysis discloses that between 1937 and 1946, Virginia acquired no community property, because the yearly income generated by the preceding year's net worth was always less than 7 percent. In 1947, however, income exceeded 7 percent, thus generating community income which, when decreased by 1947 community expenses, constituted 3.5 percent of the 1947 year-end net worth. Again in 1948, the income generated by the 96.5 percent of the corpus remaining separate property exceeded a normal 7 percent return, resulting in an allocation of the excess to the community estate. This excess, when added to the income *directly* generated by the 3.5

confined to the financial and business activity of E. L. Cord from 1953 until his death in 1974.

During the two-week non-jury trial, several expert witnesses testified on the various accounting procedures they used in apportioning E. L. Cord's estate. Appellant's expert witnesses testified that under their formulas, 79.37 percent of E. L. Cord's separate estate should be allocated to the community. In contrast, the respondents' expert witnesses ultimately concluded that there was no community property at E. L. Cord's death in 1974.

The district court held that the accounting methods and evidence presented by the respondents was more credible than the evidence presented by appellant. The lower court dismissed appellant's action and held all assets of E. L. Cord to be separate property. We affirm.

The district court found that E. L. Cord "expended only minimal time and effort in the supervision and investment of his separate property during the years 1953 to 1974." Appellant contends that in so ruling, the lower court failed to follow the law of the case as mandated in *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978).

In *Cord v. Neuhoff, supra*, this court noted, "there is no suggestion that the increased value of Errett's estate was due to a natural enhancement, or that he expended only minimal effort. The evidence is otherwise and establishes that he devoted great time and energy to the management of his wealth." In the initial *Cord* case, the only evidence presented was the post-nuptial contract and financial records of E. L. Cord from 1937 to 1953. Thus, this court did not consider any evidence

---

percent of the corpus constituting community property and decreased by 1948 expenses, increased the community interest in the entire corpus to approximately 15.8 percent. In all years between 1949 and 1952, community expenses exceeded community income, thus causing a decrease in residual community holdings. Thus on December 31, 1952, approximately 11.6 percent of the holdings constituted community property." *Cord v. Neuhoff*, 94 Nev. 21, 27, 573 P.2d 1170, 1174 (1978) (emphasis in original).

regarding the status of E. L. Cord's separate wealth or the time, effort and skill he used in amassing it from 1953 to 1974.

A principle or rule of law enunciated by an appellate court which is necessary to the decision, becomes the law of the case and must be followed throughout its subsequent progress both in the lower court and upon subsequent appeal. The law of the first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same. *LoBue v. State ex rel. Dept. Hwys.*, 92 Nev. 529, 554 P.2d 258 (1976); *see also Walker v. State*, 85 Nev. 337, 455 P.2d 34 (1969); and *State v. Loveless*, 62 Nev. 312, 150 P.2d 1015 (1944).

In the instant case, appellant erroneously concludes that the law and facts presented in her first appeal are substantially the same as those presented herein. In *Cord v. Neuhoff, supra*, our decision was premised upon the parties involvement in a post-nuptial agreement. Moreover, this court only considered evidence relating to E. L. Cord's financial activity from 1937 to 1953. Here, the financial matters at issue, as well as the factual circumstances surrounding them, involve the years 1953 to 1974. We conclude the doctrine of law of the case was not violated by the lower court under the circumstances presented herein.

Next, appellant suggests the lower court erred in finding that the separate property of E. L. Cord was entitled to reimbursement for expenditures for community expenses after community assets were exhausted.

Appellant relies on the California Supreme Court case of *See v. See*, 64 Cal.2d 778, 51 Cal.Rptr. 888, 415 P.2d 776 (1966), wherein the court held: "[A] husband who elects to use his separate property instead of community property to meet community expenses cannot claim reimbursement. In the absence of an agreement to the contrary, the use of his separate property by a husband for community purposes is a gift to the community." The facts in *See v. See, supra*, reflect that the plaintiff husband made a conscious election to spend his separate wealth on community expenses and was guilty of commingling his separate funds with community funds.

The facts in the instant case are more akin to those found in *Beam v. Bank of America*, 6 Cal.3d 12, 98 Cal.Rptr. 137, 490 P.2d 257 (1971). In *Beam v. Bank of America, supra,* the plaintiff husband assumed during the course of marriage that all his funds were his separate property. The evidence reflected that Mr. Beam did not make a conscious choice to spend his separate property on community expenses. The court in *Beam* distinguished *See v. See, supra,* and noted:

> In the instant case, of course, Mr. Beam made no conscious choice to spend his separate property, rather than the "imputed" community property on the family's living expenses. Only by means of a formula now applied by the court do we divide Mr. Beam's income into theoretical "community" and "separate" portions; Beam could hardly draw upon a fictionalized separate source to pay family expenses. Thus our decision in *See* is simply not in point.

Beam v. Bank of America, 6 Cal.3d 12, 98 Cal.Rptr. 137, 144, 490 P.2d 257, 264 (1971).

Here, E.L. Cord's expenditures for community expenses were made while operating under the assumption that the parties' post-nuptial agreement was valid, and all his funds were his separate property. Consequently, E. L. Cord never made a conscious choice to spend his separate property on community expenses which exceeded community assets.

If E. L. Cord had made a conscious choice to use his separate property, rather than available community property, to pay community expenses, such use of his separate property would have constituted a gift to the community for which reimbursement could not be claimed. *See See v. See,* 64 Cal.2d 778, 51 Cal.Rptr. 888, 415 P.2d 776 (1966). The record clearly establishes, however, that E. L. Cord assumed through the years 1953 until his death in 1974 that all of his funds were his separate property. He did not consciously elect to pay for community expenses out of income which is now deemed separate in character.

The standard enunciated in *Beam v. Bank of America*, 6 Cal.3d 12, 98 Cal.Rptr. 137, 490 P.2d 257 (1971) supports the district court's ruling requiring reimbursement to E. L. Cord's separate estate for expenditures on family living expenses in years when community assets were exhausted.

Under the law, rents and profits from a spouse's separate property constitute separate property. However, all property acquired after marriage is presumed to be community property. This presumption may be rebutted by clear and convincing evidence. *Kelly v. Kelly*, 86 Nev. 301, 468 P.2d 359 (1970).

It is well settled that there must be an apportionment of any increment in value between the separate estate of the owner and the community, unless the increment is due solely to a natural enhancement of the property or minimal effort by the owner. *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488 (1909); *Johnson v. Johnson*, 89 Nev. 244, 510 P.2d 625 (1973); *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978). In the instant case, the district court found that E. L. Cord did not take an active part in any business he invested in or expend any time, energy or skill in managing real property he owned. The court also found that any increase in value of his separate property was attributable to other managers or general economic conditions.

The record reflects that from 1953 to E. L. Cord's death in 1974, many of Cord's assets increased in value due to natural enhancement and escalating real estate values. During this time period, E. L. Cord's health noticeably declined. Consequently, he delegated substantial authority to his son Charles, who acted as general manager for a number of Cord businesses. Respondents presented several fact witnesses who testified about E. L. Cord's work habits and declining health. Many of these same witnesses testified that Cord's assets increased in value due to substantial holdings in raw land, inflationary factors, and natural enhancement.

Appellant called only one fact witness, who had sporadic contact with E. L. Cord. He testified that Cord made all final decisions regarding his various business interests until his death in 1974.

Both parties introduced expert testimony in the area of accounting. The experts for respondents and appellant based their formulations on the year-by-year apportionment method enunciated in *Pereira v. Pereira,* 156 Cal. 1, 103 P. 488 (1909). Although the expert accounting witnesses for both parties testified that they utilized the *Pereira* apportionment method, their particular accounting formulas resulted in vastly different findings.

The district court was presented with extremely conflicting evidence involving both factual and accounting issues. "Where a trial court, sitting without a jury, has made a determination upon the basis of conflicting evidence, that determination should not be disturbed on appeal if it is supported by substantial evidence." *Fletcher v. Fletcher,* 89 Nev. 540, 516 P.2d 103 (1973); *see also Ormachea v. Ormachea,* 67 Nev. 273, 217 P.2d 355 (1950). Thus, the record must reveal that the judgment was clearly erroneous and not based upon substantial evidence before the district court will be reversed. *Fletcher v. Fletcher,* 89 Nev. 540, 516 P.2d 103 (1973).

We cannot say from this record that the trial court erred in determining that the position propounded by appellant was not adequately proved to the satisfaction of the court. Appellant's other points of error being without merit, we affirm.

GUNDERSON, C. J., MANOUKIAN and SPRINGER, JJ., ZENOFF, *Senior Justice*[2] and MENDOZA, *District Judge*[3], concur.

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2 The Chief Justice designated the Honorable David Zenoff, Senior Justice, to sit in place of the Honorable Cameron Batjer, Justice. Nev. Const. art. 6, § 19; SCR 10.

3 The Governor designated the Honorable John F. Mendoza, District Judge of the Eighth Judicial District, to sit in this case in place of the Honorable John Mowbray, Justice, who voluntarily disqualified himself. Nev.Const. art. 6, § 4.

Appendix F

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 13040

[Filed—May 27 1982—C.R. Davenport, Clerk of Supreme Court, by Judith Fountain, Deputy Clerk]

VIRGINIA KIRK CORD,

Appellant,

vs.

CHARLES E. CORD and EDWARD D. NEUHOFF, Co-Executors of the Estate of E. L. CORD, aka ERRETT L. CORD, aka ERRETT LOBBAN CORD, deceased, and individually,

Respondents.

PETITION FOR REHEARING

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PETITION FOR REHEARING

VIRGINIA KIRK CORD respectfully requests this Honorable Court to grant a rehearing of her Appeal from the District Court Judgment given by Judge James Guinan.

Her request rests solidly upon two grounds, either of which requires this Court in the interest of justice, to reconsider its per curium opinion and to write another one which squares with the record and the facts.

FIRST GROUND: The per curium opinion of this Court affirming the judgment of Judge Guinan rests upon a factual foundation which is absolutely wrong and simply not true.

SECOND GROUND: The record discloses that the Findings, Conclusions and Judgment of Judge Guinan were made and entered after he admittedly possessed an ACTUAL BIAS against counsel, Nada Novakovich, which was so deep and so strong as to prejudice him against counsel's client Virginia Kirk Cord, the Petitioner herein.

ARGUMENT

* * * * *

2. *Actual Bias:*

"A Judge shall not act in an action or proceeding wherein he entertains an actual bias or prejudice for or against one of the parties to the action." Such is the command of *NRS* 1.230.

A fair Trial before a fair Tribunal is a basic requirement of due process. Fairness requires the absence of actual bias in the trial of cases. *In re Murchison*, 349 U.S. 133 (1955). The record in this case will disclose that Judge Guinan entertained an actual bias against counsel Novakovich and through her against her client, Virginia Kirk Cord, before his Finding of Fact, Conclusions of Law and Judgment were made and entered. (ROA Vol. XX)

The transcript of proceedings dated January 16, 1981, filed January 27, 1981 (ROA Vol. XX) shows Judge Guinan's statement:

> "We are in open court this morning to make a record in these cases numbered 292073 and 298806 on the disqualification of myself as judge in any further proceedings.
>
> "On October 28, 1980 I was informed by Mr. Newpher who was secretary at the time of the Judicial Discipline Commission, that Miss Novakovich had filed a complaint against me with the Commission.
>
> "After due consideration of that event I decided that I entertain an actual bias against her and through her against her client, Mrs. Cord, and therefore I can no longer proceed in these cases."

The complaint to which the judge made reference when he disqualified himself from further proceedings in this case was filed before he entered his Findings of Fact, Conclusions of Law and Judgment on November 5, 1980! (ROA Vol. III, p. 1124) It was his judicial obligation then to assign the case to another judge who did not entertain an actual bias against a party to the action, rather than to proceed to make Findings and enter Judgment against that party.

A fair trial before a fair tribunal requirement rests upon the due process clause of the Fourteenth Amendment. *Payne v. Lee*, 24 N.W.2d, 259 (Minn. 1946). It is basic. It is fundamental. A violation of this principle simply cannot be countenanced. A Judgment entered by a judge against a party against whom he entertains an actual bias must be set aside and declared null and void. *Nelson v. Fitzgerald*, 403 P.2d 677 (Alaska, 1965).

This point was neither briefed nor argued upon appeal. Normally, a litigant may not raise a new legal point for the first time on rehearing. *In re Lorring*, 75 Nev. 330, 340 P.2d 589 (1959), rehearing denied, 75 Nev. 334, 349 P.2d 156 (1960). This principle, however, does not apply where counsel has directed the Court's attention to an incontrovertible fact, verifiable by public records. *Cannon v. Taylor*, 88 Nev. 89, 493 P.2d 1313 (1972). We ask this Court to apply the rule of

Cannon v. Taylor to this case since fairness demands such application.

For the reasons expressed, we respectfully request that the rehearing be granted.

DATED this 27th day of May, 1982.

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Appendix G

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 13040

[Filed—Jun 7 1982—C.R. Davenport, Clerk of Supreme Court, by Judith Fountain, Deputy Clerk]

VIRGINIA KIRK CORD,

Appellant,

vs.

CHARLES E. CORD and EDWARD D. NEUHOFF, Co-Executors of the Estate of E. L. CORD, aka ERRETT L. CORD, aka ERRETT LOBBAN CORD, deceased, and individually,

Respondents.

ANSWER TO PETITION FOR REHEARING

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ANSWER TO PETITION FOR REHEARING

Respondents answer appellant's Petition for Rehearing and respectfully urge that the Petition for Rehearing be denied because neither of the two grounds urged in the petition meets the requirements of Rule 40 of the Nevada Rules of Appellate Procedure as grounds for granting a petition for rehearing.

The First Ground upon which appellant's Petition for Rehearing is based is nothing more than a reargument of matters which were urged by appellant in her opening and closing briefs, and further urged in her oral argument to the Supreme Court. Appellant reargues evidentiary matters that were selected by her in support of her contentions, and which were rejected by the trial court, rejected by the Supreme Court, and are precluded from constituting grounds for rehearing pursuant to NRAP Rule 40 (c), which specifically excepts matters presented in the briefs and oral arguments from being reargued in the petition for rehearing.

The material cited by appellant in support of her reargument of the issue of E. L. Cord's activities after 1953 is no more than a repetition of Appellant's Opening Brief, filed in January, 1981. The material contained in pages two through seven of her Petition for Rehearing appears at pages eleven through eighteen of Appellant's Opening Brief. The material cited on page eight of the Petition For Rehearing was presented at pages forty-two through forty-five of Appellant's Opening Brief.

With reference to the application of the *Pereira* formula, appellant argues (at pages ten through thirteen of Petition for Rehearing) exactly the same matters presented in her Opening Brief at pages six, seven, thirty-one, thirty-two, thirty-five, and forty-one.

The issue of the applicability of the first appeal of this case to post-1953 financial matters was responded to by the Co-Executors at pages three through five of Respondents' Answering Brief. Respondents, at pages seven through nineteen and thirty-six through forty-one of their Answering Brief, have answered these arguments of appellant. The analysis and

conclusions of the first trial were regarding financial matters *before* 1953. In the second trial, upon remand, the trial court heard *all* the evidence and testimony, which was characterized as "conflicting" by this Court. On that basis, the trial court's opinion is entitled to be affirmed, and appellant is *not* entitled to present these matters again on Petition For Rehearing.

Appellant's Second Ground in her Petition for Rehearing is that Judge Guinan entertained an actual bias against counsel Novakovich and through her against her client, Virginia Kirk Cord, before his Findings of Fact, Conclusions of Law and Judgment were made and entered. Counsel admits that she did not brief or argue this point in her appeal. She now seeks to raise it for the first time in her Petition for Rehearing in violation of the clear and concise language of Rule 40 (c) (1), NRAP, which states ". . . and no point may be raised for the first time on rehearing." Counsel seeks to circumvent the requirements of Rule 40 (c) (1) NRAP by urging this Court to disregard the requirements of Rule 40 (c) (1) NRAP on the basis of *Cannon v. Taylor*, 88 Nev. 89, 493 P2d 1313. The holding of this Court in the *Cannon* case does not abrogate or supersede the requirements of Rule 40 (c) (1) NRAP. In the *Cannon* case, the Court merely allowed respondent's counsel to direct the Court's attention to Attorney General's Opinion #422 which counsel did not brief or argue on appeal, and of which the Court was unaware. Attorney General Opinion #422 discussed the statute in question in the litigation. In the trial court, both parties moved for summary judgment on the grounds there were no disputed facts. The trial court granted the officials' motion for summary judgment, giving them the right to fix their own salary levels. On appeal, the Supreme Court reversed, requiring reimbursement of some compensation by the city officials. On rehearing, the Supreme Court took notice of Attorney General's Opinion #422, and the officials' reliance on the opinion in accepting salary increases. On rehearing, the Supreme Court withdrew its prior opinion only insofar as it ordered reversal of the judgment entered by the lower court, and affirmed the summary judgment in favor of the respondent public officials.

The Supreme Court in its opinion on rehearing stated:

> "As appellants contend, our established practice does not allow a litigant to raise new legal points for the first time on rehearing. cf. *In Re Loring*, 75 Nev. 330, 340 P2d 589 (1959); rehearing denied, 75 Nev. 334, 349 P2d 156 (1960). Here, however, we consider that respondent's counsel has merely directed our attention to an incontrovertible fact, verifiable from the records in the building where we sit. . . .".

This decision certainly does not overrule the *Loring* decision on rehearing, nor does it in any way alter or modify Rule 40 (c) (1) NRAP. On the contrary, it specifically reaffirms *Loring* and Rule 40 NRAP (c) (1).

Counsel for appellant elected not to raise the question of Judge Guinan's bias on her appeal obviously because Judge Guinan had no bias against her at the time he signed his Findings of Fact, Conclusions of Law and Judgment.

Since counsel for appellant consciously elected not to raise this issue on appeal, she is precluded from raising it in her Petition for Rehearing by NRAP 40 (c) (1).

Counsel's attempt to supplement the Record on Appeal by designating the Transcript of Proceedings filed in January 27, 1981, in case numbers 298806 and 292073 in the court below, for the first time, with her Petition for Rehearing is not sanctioned by Rule 40 NRAP and is in violation of NRAP 10 (a), 10 (g), and 11 (a).

Counsel for appellant had every opportunity to raise this point in her appeal and to include this transcript of proceedings held on January 16, 1979, in her designation of the Record on Appeal. She consciously elected not to do so. Even though this transcript is improperly filed, it establishes that Judge Guinan did not have any bias against Miss Novakovich or Virginia Kirk Cord at the time he signed and filed his Findings of Fact, Conclusions of Law and Judgment on November 5, 1980, but only after due consideration by him after being informed on October 28, 1980 of counsel's complaint against

him with the Commission on Judicial Discipline. After due consideration by Judge Guinan, and on December 1, 1980, he called counsel for appellant and respondents into his chambers, and there notified both counsel that he was withdrawing from this case and in the Matter of the Estate of E. L. Cord, Case No. 292073, In The Second Judicial District Court, upon the ground that he had an actual bias against appellant's counsel. Counsel for appellant confirms this on page 4 of her Opening Brief filed in this matter where she stated:

> "On December 1, 1980, in his chambers, Judge Guinan advised counsel for respondents and appellant that he was withdrawing from this case and In the Matter of the Estate of E. L. Cord, Case No., 292073 In the Second Judicial District Court upon the ground that he had an actual bias against appellant's counsel."

Appellant's Reply Brief was filed on May 18, 1980, and made no further reference to the question of Judge Guinan's alleged bias, nor was it urged by counsel for appellant in her oral argument. Judge Guinan had no bias against counsel for appellant or Mrs. Cord at the time he signed and filed his Findings of Fact, Conclusions of Law and Judgment on November 5, 1980.

The opinion of this Court is a proper opinion, correct and just.

It is therefore respectfully urged that appellant's Petition for Rehearing be denied.

Respectfully submitted this 4th day of June, 1982.

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Appendix H

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

VIRGINIA K. CORD,

Plaintiff,

vs.

EDWARD D. NEUHOFF and CHARLES E. CORD, et al,

Defendants.

MOTION TO VACATE AND SET ASIDE JUDGMENT

COMES NOW the Plaintiff, VIRGINIA K. CORD, by and through her undersigned counsel, and hereby moves this Court, pursuant to the provisions of Rule 60(b)(3) of the Nevada Rules of Civil Procedure, for an order setting aside and vacating the judgment heretofore entered in the above-entitled action on November 5, 1980, affirmed by the Nevada Supreme Court on May 12, 1982, rehearing denied, December 16, 1982, upon the grounds that such Judgment, and the Findings of Fact and Conclusions of Law upon which such Judgment is based are absolutely void and a legal nullity. Plaintiff further moves that, upon the vacating of such Judgment, the matter be set for a new trial on the merits.

This motion is based upon the grounds that the Findings of Fact, Conclusions of Law and Judgment were rendered by the trial judge at a point in time when he was disqualified, as a matter of law, from acting in the case, by reason of an existing actual bias against the Plaintiff and her counsel.

This motion is supported by the files and records in this action, in particular the Transcript of Proceedings of January 16, 1981, filed on January 27, 1981, and the points and authorities which are submitted herewith.

DATED this 25th day of February, 1983.

Respectfully submitted

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IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

VIRGINIA K. CORD,

Plaintiff,

vs.

EDWARD D. NEUHOFF and CHARLES E. CORD, et al,

Defendants.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO VACATE AND SET ASIDE JUDGMENT

COMES NOW the Plaintiff, VIRGINIA K. CORD, by and through her undersigned counsel, and hereby submits the following points and authorities in support of her motion to vacate and set aside the Judgment heretofore rendered, and filed and entered on November 5, 1980, affirmed by the Nevada Supreme Court on May 12, 1982, rehearing denied, December 16, 1982.

SUMMARY OF RELEVANT FACTS

This motion is directed to the legal efficacy of the Judgment and the Findings of Fact and Conclusions of Law which support the Judgment on an issue which does not pertain to the merits thereof, but rather to the jurisdiction of the Court to act. Therefore, the only relevant facts are as follows:

On November 5, 1980, this Court, The Honorable James J. Guinan presiding, rendered Findings of Fact, Conclusions of

Law and Judgment dismissing the Plaintiff's claim to a community property share of the assets of the Estate of E. L. Cord, deceased. On January 16, 1981, the Trial Judge, in proceedings held on the record in open court, stated:

> "On October 28th, 1980, I was informed by Mr. Newpher who was the secretary at that time of the Judicial Discipline Commission, that Miss Novacovich (sic) had filed a complaint against me with the Commission.
>
> "After due consideration of that event, I decided that I entertain actual bias against her and through her against her client, Mrs. Cord, and therefore, I can no longer proceed in these cases." (Transcript, January 16, 1981, p. 2, 11. 8-15)

Counsel for the Defendants asked for clarification of the Judge's statement as follows:

> "MR. BRADLEY: I would respectfully, your Honor, ask permission to ask you one question.
>
> "THE COURT: You may.
>
> "MR. BRADLEY: I understand from your statement on the record that your bias arose by virtue of this charge against you created by Miss Novakovich's complaint to the Judicial Commission as of October 25, 1980—
>
> "THE COURT: 28th.
>
> "MR. BRADLEY: October 28th, 1980, and that there was no bias, actual, implied or otherwise, either against Miss Novakovich or her client "prior to that."
>
> "THE COURT: That's correct. I had no reason to have any bias against anyone in this case up to that point." (Transcript of Proceedings, January 16, 1981, p. 2, 11. 29-30; p. 3, 11. 1-11).

ARGUMENT

A. THE JUDGMENT IS ABSOLUTELY VOID AND A LEGAL NULLITY

The foregoing record clearly establishes beyond controversy that the Trial Judge has admitted and acknowledged the recognition of actual bias against Plaintiff's counsel, and through her, against the Plaintiff, as of October 28, 1980, the date he was informed of a complaint filed against him by Plaintiff's counsel with the Judicial Discipline Commission. This actual bias, however, was not acknowledged by the Court or brought to the attention of the parties and their counsel until several months later.

N.R.S. 1.230 provides:

> "1. A judge shall not act as such in an action or proceeding when he entertains actual bias or prejudice for or against one of the parties to the action."

The language of N.R.S. 1.230(1) is mandatory and self-executing. It does not require a motion on behalf of a party, but rather imposes a direct duty upon the judge to recuse himself upon the occurrence of the event therein specified, which is the existence of an actual bias or prejudice against one of the parties. As is clear from Judge Guinan's own belated admission on the record in open court on January 16, 1981, this condition of statutory disqualification existed as of October 28, 1980. By the time the existence of such ground of disqualification was acknowledged and brought to the attention of the parties and counsel, however, the case was pending before the Nevada Supreme Court. In fact, Plaintiff's Opening Brief in the Supreme Court was filed on the same day as the proceedings in court wherein such bias was acknowledged.

It is submitted that as of October 28, 1980, the Judge was required by law to recuse himself, and was, as a matter of law, disqualified to act in the case. He nonetheless did not reveal this fact to the parties and their counsel, and thereafter, on November 5, 1980, rendered Findings of Fact, Conclusions of

Law and Judgment in favor of the Defendants. It is submitted that, under the law of the State of Nevada, as well as other jurisdictions having similar statutory disqualification provisions, such Judgment and the Findings of Fact and Conclusions of Law in support thereof are absolutely null and void.

Although some jurisdictions hold that an order or judgment rendered by a disqualified judge is merely voidable on motion of a party, the law of the State of Nevada that such orders and judgments are absolutely void has been well established for almost one hundred years. In *Frevert v. Swift,* 19 Nev. 363, 11 Pac. 273 (1886), the Nevada Supreme Court said:

> "At common law, any action upon the part of a judge interested in the cause was regarded as an error or irregularity to be corrected by a reversal of his judgment; 'but the general effect of the statutory prohibitions in the several states is undoubtedly to change the rule of the common law so far as to render those acts of a judge involving the exercise of judicial discretion in a case where he is disqualified from acting, not voidable merely, but void.' (Citations omitted)
>
> ". . .The application (for an extension of time) to the judge, who was disqualified, might as well have been made to a stranger having no authority to act. If it had been granted, the order would have been absolutely null and void. Under these circumstances, the case must be treated as if no application had been made for any extension of time to file amendments."

This view was reaffirmed sixteen years later in *State ex rel Bullion & Exchange Bank v. Mack,* 26 Nev. 430, 69 Pac. 862 (1902). In that case the judge was a stockholder in one of the involved banks, and refused to enter an order approving or rejecting the claim of such bank. The bank brought a mandamus action to compel the judge to act, and the judge responded disclosing the disqualifying interest. In denying relief, the Nevada Supreme Court said: (26 Nev. at p. 442)

> "The answer of respondent to relator's petition was, as we believe, such an interest, under the facts, as would

disqualify him to act upon relator's or intervenor's claim under the rule of the common law or the rule of our Civil Practice Act, if such rule should prevail in probate proceedings.

"It is a rule of the common law that a judge shall not hear and determine actions in which he is interested (citations omitted, and it is the express declaration of our statute (Comp. Laws, 1900, sec. 2545) that a judge shall not act in an action or proceeding in which he is interested.

"Under this statutory rule this court has held that the act of a disqualified judge is absolutely void. (Frevert v. Swift, 19 Nev. 364; State v. Noyes, supra)"

In *Hoff v. Eighth Judicial District Court*, 79 Nev. 108, 378 P.2d 977 (1963), the judge was related to the district attorney. In holding that all orders entered by the judge at the defendant's arraignment were void, the Court said:

"It was further said in the Ebey case: 'A sound policy seems to demand that, independent of the rights of the parties to the action, the judicial tribunal appointed by law to administer justice should be preserved from discredit by a broad and liberal construction of the statute to the end of securing a judgment untainted with bias or interest. Courts should be slow to discover subtle and refined distinctions for indulging doubtful jurisdiction where the liberty of a citizen is at stake.'

"The same policy has been announced in Nevada. In McCormick v. District Court, 67 Nev. 318, 331, 218 P.2d 939, 945, we stated: 'The Legislature has thus declared the public policy of the state, not so much for the protection of an indivdual litigant, as for the preservation of the respect and high regard the public has always maintained for the courts.'

"As the statute quoted, the respondent judge was disqualified from proceeding at petitioner's arraignment, and as the orders at the arraignment were accordingly void, the same are hereby vacated."

California's statutory disqualification provisions, Code of Civil Procedure, sec. 170, are the same as N.R.S. 1.230, and California, in construing such provisions, has uniformly held that when a judge is disqualified by reason of bias or interest, or alleged bias or interest, any acts thereafter taken in the litigation by him are absolutely void. (*In re Robert P.*, 121 Cal.App. 3d, 36, 175 Cal.Rptr. 252, 256 (1981); *People v. Hall*, 86 Cal.App.3d 753, 150 Cal.Rptr. 412 (1978); *T.P.B. Jr. v. Superior Court for the County of Alameda*, 66 Cal.App.3d 857, 136 Cal.Rptr. 311 (1977); *Woodman v. Selvege*, 69 Cal.Rptr. 687 (Cal.App. 1968); *In re Jose S.*, 78 Cal.App.3d 619, 144 Cal.Rptr. 309 (1978); *McCartney v. Commision on Judicial Qualifications*, 12 Cal.3d 512, 531-532, 116 Cal.Rptr. 260 (1977)).

Similarly, in *Bolden v. State*, 561 S.W.2d 281 (Ark. 1978), an exchange occurred between defense counsel and the court at the pre-trial conference, as a result of which defense counsel orally requested the Court to disqualify itself on the ground of bias. The Judge said "I will be glad to excuse myself from it." Thereafter, he appointed a new jury commission and advised the jurors of their duties, and denied a pending motion to suppress. He then transferred the case to another judge, and the defendant was tried and found guilty. On appeal, the Court reversed, noting that the Court's willingness to recuse himself at defense counsel's suggestion of bias was an implied admission of bias. The Court then said:

> ". . . Having announced from the bench and for the record his disqualification, Judge Hargrave lost jurisdiction of the case and was without authority to act further in any judicial capacity, except to make the proper transfer of the case or take appropriate steps for the selection of another judge. . .
>
> "The judge's voluntary disqualification may have, in the judgment of appellants and their counsel, amounted to an admission of his bias and prejudice, and for the judge to proceed with issues raised by defendants involv-

ing the exercise of discretion, may have further supported their doubt or suspicion of the impartiality of his rulings.

* * *

"We conclude that this case should be reversed and remanded to the trial court in view of the error committed by the trial judge's predecessor performing discretionary powers after disqualifying himself in the case and in view of the improper verdict forms submitted to the jury."

See also *Cuyahoga County Board of Mental Retardation v. Association of Cuyahoga County Teachers*, 47 Ohio App.2d 28, 351 N.E.2d 777 (1975) where the Court said:

"The sworn affidavit of two of the appellants states that the brother of the trial judge is and was, at all times relevant to these proceedings, an officer of the plaintiff appellee. These statements were not only uncontradicted but apparently provided, in whole or in part, the grounds for the ruling from the Chief Justice of the Ohio Supreme Court directing that the case be reassigned to another judge. With the undisputed facts in this posture, we conclude that the trial judge was under an obligation to disqualify himself.

". . .We conclude that the trial judge was prohibited from hearing this case; that he was under a compulsory duty to disqualify himself; and that his breach of that duty rendered his subsequent acts null and void. . . .

"In examining the Code of Judicial Conduct, it is apparent that where the permissible guidelines are indicated by the use of the word 'may', the mandatory portions are set forth by the use of the word 'shall'. . . .

"With this in mind we have have [sic] no hesitancy in finding that the trial judge in the case at bar—a case in which the operative facts are not in dispute—was under a compulsory duty to disqualify himself. We further find that the attempt of a trial judge to exercise his authority as a judge in violation of his clear mandatory duty is of absolutely no effect. (Citations omitted)

> ". . . For these reasons, we hold that the trial judge in the instant case had a mandatory duty from the beginning of the proceedings to disqualify himself from this case, and that his each and every subsequent act, being in violation of this clear and mandatory duty, was utterly void and without effect."

It is respectfully submitted that in the case at bar, Judge Guinan was disqualified by N.R.S 1.230 from acting in the above-entitled case at the moment the cause for such disqualification arose. The record in this case shows that the Judge has admitted and acknowledged the existence of an actual bias at least as early as October 28, 1980. From that point on, he was under a statutory mandate not to do anything further in the case, and therefore everything he did thereafter, except transferring the case to another judge, was absolutely void. It is, therefore, as if no Findings of Fact, Conclusions of Law or Judgment had ever been rendered. (*State v. Mack, supra*).

In *King v. Ellis*, 146 Ga.App. 157, 246 S.E.2d 1 (1978), a parallel situation was presented, wherein a trial judge acknowledged a bias or prejudice pertaining to defense counsel, and on October 25, 1977, entered an order disqualifying himself from hearing any case in which a party was represented by that attorney. The appellate court held that such acknowledgment of bias not only disqualified the judge from acting further in the case, but rendered void all orders entered in the case prior to such acknowledgment of bias from the point in time that the attorney entered the case. The Court therein stated:

> "Two of the appealable orders in this case were entered on October 21, 1977 and October 24, 1977 respectively. On October 25, 1977, the trial judge who signed these orders was disqualified from hearing any cases in which a party was represented by defendant's counsel. On November 11, 1977, the third order involved in these appeals was entered and it was also signed by the disqualified judge. While the first two orders were entered prior to the announced disqualification of this trial judge, the fact of disqualification relates back and renders all of the orders

> or judicial acts taken by him void and nugatory. Garland v. State, 110 Ga.App. 756, 140 S.E.2d 46. . ."

It is therefore submitted that the Judgment and Findings of Fact and Conclusions of Law which were rendered after the fact of bias existed must be vacated and set aside, and a new trial on the merits ordered.

B. THE ISSUE OF VOIDNESS BY REASON OF DISQUALIFICATION IS NOT SUBJECT TO WAIVER OR ESTOPPEL.

In jurisdictions such as Nevada, where the disqualification of a judge is an impediment which renders judgments and orders absolutely void, the courts have held that such disqualification deprives the Court of its jurisdiction over the subject matter of the case, and thus is a defect which is not subject to waiver or estoppel. In addition, where the disqualification arises from a statutory impediment such as an interest in the subject matter of the ligigation or actual bias for or against any party, the disqualification is self-executing and does not require the motion of a party. The language of N.R.S. 1.230 parallels the federal statute (28 U.S.C.A. Sec. 455) in its mandatory language "a judge shall not act."

In construing the federal statute, the federal courts have held that even a voluntary waiver or consent cannot be accepted where the disqualifying fact is an interest or a bias for or against a party. (*United States v. Conforte*, 624 F.2d 869, 880-881 (9th Cir. 1980). In *S.C.A. Services, Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977), the Court said:

> "As a defense to the proceedings in this court, respondent Lucky Stores claims that disqualification is required because S.C.A. has waived its right to enforce section 455. As evidence of its position, Lucky Stores notes the numerous proceedings which have been had in this case since S.C.A. learned of the existence of the familial relationship in February, 1976. Lucky Stores cites no case or other authority, however, to support its estoppel theory.

Indeed, there is no basis in law to support this claim. The waiver section of Sec. 455 provides:

> "No . . . judge . . . shall accept from the parties to the proceedings a waiver of any ground for disqualification enumerated in section (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

"The provisions are mandatory; they are addressed to the judge and require that he disqualify himself in certain circumstances. They were adopted because the drafters of the statute believed 'that confidence in the impartiality of federal judges in enhanced by a more strict treatment of waiver'. They impose no duty on the parties to seek disqualification nor do they contain any time limit within which disqualification must be sought."

In *W. Clay Jackson Enterprises, Inc. v. Greyhound Leasing & Financial Corp.*, 467 F.Supp. 801 (D.C. Puerto Rico 1979), the judge discovered as the result of an affidavit filed in the proceeding that he was disqualified by reason of having represented one of the corporations involved in a joint venture with one of the parties. He disclosed these facts on the record and offered to disqualify himself if any of the parties wished him to do so. Defendant's counsel indicated on the record that he had no objection to proceeding with the judge. Sometime later in the litigation, the defendant sought a continuance, which was denied. The defendant's counsel then filed a motion to disqualify the judge on the eve of trial on the same grounds that he had previously indicated were not objectionable to him. The trial judge indicated that he felt this was a last-ditch effort to obtain a delay, but nonetheless disqualified himself, stating:

> "Notwithstanding defendant's bad faith delay in acting on this matter, we believe that such doubt must be resolved in favor of disqualification, inasmuch as it is statutorily mandated and cannot be waived by any party.

> S.C.A. Services, Inc. v. Morgan, 557 F.2d 110 (C.A. 7 1977) cf. Bradley v. Milliken, 426 F.Supp. 929 (D.C. Mich. 1977). The statute further makes no exception by virtue of the jury nature of this case."

Other jurisdictions which have mandatory statutory disqualification provisions also recognize that disqualification results in loss of subject matter jurisdiction and is not waivable or subject to the doctrine of estoppel. In *Cummings v. Christenson,* 109 Mis.2d 255, 439 N.Y.S.2d 825 (N.Y. Fam.Ct. 1981), the judge in a custody proceeding had been the "law guardian" of the children in a prior custody challenge. When the case was called before him as the judge, he informed the parties of this fact, and stated on the record that at the request of either party, he would disqualify himself. Neither party objected to his proceeding with the case. However, on his own motion thereafter, the judge recused himself, stating: (439 N.Y.S.2d at p. 827)

> "However, statutes requiring disqualification on the basis of interest or bias are jurisdictional in nature, and the parties may not even consent that a judge sit as such on the case when the judge is disqualified by operation of statute. (*Oakley v. Aspinwall,* 3 N.Y. 547, p. 550; *Castarella v. Castarella,* 65 A.D.2d 614, 409 N.Y.S.2d 548 (2nd Dept. 1978); *Queens Nassau Mtge. Co. v. Graham,* 157 App.Div. 489, 142 N.Y.S. 180)."

In *Lee v. State,* 555 S.W.2d 121 (Tex. Ct. Crim.App. 1977) the Court succinctly summarized the rule as follows:

> "Disqualification of a judge arising from a constitutional or statutory provision to preside over a trial of a case affects jurisdiction, and cannot be waived, and the judgment rendered is a nullity and void, and is subject even to collateral attack. (Citations omitted)."

In the case at bar, the first time the disqualifying matter was disclosed, the case was already on appeal to the Nevada

Supreme Court. Plaintiff never consented to continue with Judge Guinan after the disqualifying matter was revealed, and never had the opportunity to make a motion based on such disqualification since the judge recused himself at the same time he disclosed he was disqualified. However, it is submitted that even if the Plaintiff had impliedly agreed, such agreement or consent would be invalid in any event. Canon 3 of the Code of Judicial Conduct provides in Sec. C(a) that a judge should disqualify himself for actual bias. Section C provides other bases for disqualification in subsections (b) (acting as lawyer for a party) (c) association with lawyer (d) financial interest and (e) familial relationship. Canon 3(D) of the Code of Judicial Conduct permits disqualification to be waived after full disclosure on the record only as to grounds (c) (d) and (e). Waiver is not permitted as to ground (a) which is the ground here involved; this provision parallels the federal statute on waiver of disqualification discussed in the above-referenced authorities.

It is therefore respectfully submitted that this challenge to the validity of the Judgment and the Findings of Fact and Conclusions of Law in support thereof is timely, and that no defense of waiver or estoppel may be raised thereon.

C. THIS MOTION UNDER RULE 60(b)(3) IS TIMELY AND APPROPRIATE.

As noted above, the effect of the judge's disqualification prior to the entry of the Judgment and the supporting Findings of Fact and Conclusions of Law is to render the judgment void, not merely voidable. There is no dispute on the facts as to the fact that the judge did in fact have an actual bias against the Plaintiff and her counsel as of October 28, 1981; that is apparent from the judge's own statement on the record. As noted in Moore's Federal Practice, ¶ 60.25(2), pp. 300, 301:

> "A void judgment is something very different than a valid judgment. The void judgment creates no binding obligation upon the parties, or their privies; it is legally ineffective. And while, if it is a judgment rendered by a

federal district court, the court which rendered it may set it aside under Rule 59, within the short time period therein provided, or the judgment may be reversed or set aside upon an appeal taken within the due time where the record is adequate to show voidness, the judgment may also be set aside under 60(b)(4) within a "reasonable time", which, as here applied, means generally no time limit, the enforcement of the judgment may be enjoined, or the judgment may be collaterally attacked at any time in any proceeding, state or federal, in which the effect of the judgment comes in issue, which means that if the judgment is void it should be treated as legally ineffective in the subsequent proceedings. Even the party which obtained the void judgment may collaterally attack it. And the substance of these principles are equally applicable to a void state judgment.

"A party attacking a judgment as void need show no meritorious claim or defense or other equities in his behalf; he is entitled to have the judgment treated for what it is, a legal nullity, if he establishes that the judgment is void."

The same rules prevail in Nevada. In *LaPotin v. LaPotin,* 75 Nev. 264, 339 P.2d 123 (1959), the Court noted:

"It follows from well established principles of law that the divorce court was without jurisdiction, and that the divorce decree was void. Perry v. Seventh Judicial District Court, 42 Nev. 284, 174 P. 1058. The invalidity of the divorce decree in such a case is the proper subject of an independent action to set it aside. N.R.C.P. Rule 60(b). See Moore v. Moore, 75 Nev. 189, 336 P.2d 1073; Lauer v. Eighth Judicial District Court, 62 Nev. 78, 140 P.2d 953."

If a judgment is void, it can be set aside at any time, regardless of the merits. Jurisdiction pertains to the right of the Court to act at all, not to the merits of its decision. (*Seaborn v. First Judicial District Court,* 55 Nev. 206, 29 P.2d 500 (1934).

In *Osman v. Cobb*, 77 Nev. 133, 360 P.2d 258 (1961), the Court said:

> "The action was commenced in August, 1954, respondents filed their answer in December of that year, and the case was tried on May 7 and 8, 1958, at which time the Court ordered the matter submitted on briefs. In the trial court, plaintiff's opening brief was filed on August 13, 1958. Defendant's answering brief was filed December 3, 1958, and Plaintiff's reply brief December 5, 1958. No explanation appears for the lapse of time involved. It may be noted that at the general election held November 4, 1958, Judge Watson was defeated for re-election by a narrow margin, and that these contest proceedings extended for a number of months into 1959. This only increases the confusion with reference to filing the final briefs in December of 1958. His term of office expired December 31 of that year. No action was taken by him until February 9, 1959, when he filed his decision in favor of the defendants, respondents herein, and on February 17, 1959, signed the judgment in favor of respondents as defendants therein and against plaintiff, the appellant here. Such judgment was not filed or entered until November 10, 1959.
>
> "The filing with the clerk of the judgment signed by the judge constitutes the entry of such judgment, and the judgment is ineffective for any purpose until the entry thereof. (N.R.C.P. 58(c)) . . .
>
> "Under our statute and rules of court, and under the rule so well established as not to require citation, the judgment rendered and entered by a judge subsequent to the expiration of his term of office was void and must be vacated.
>
> "One additional point requires attention. The cases are in hopeless conflict with reference to the appeal of a void judgment. See annotation 33 LRA (N.S.) 733. This court, however, has since its beginnings held that an appeal from a void judgment might properly be considered and acted upon. (Citations omitted)

> "The judgment is vacated and the case remanded for further proceedings. In view of the facts above recited and in view of the failure of appellant to seek relief in the District Court under N.R.C.P. 60(b)(3) where such relief could have been obtained more quickly, easily and inexpensively, no costs are allowed."

It is therefore clear that although an independent action may be filed to challenge a void judgment, or a direct appeal may be taken, the preferred method as far as the Nevada Supreme Court is concerned is the utilization of Rule 60(b)(3) where it can be used. Such rule can properly be used herein as a direct challenge to the judgment, which was finally affirmed and the remittitur returned on December 16, 1982. In *Foster v. Lewis,* 78 Nev. 330, 372 P.2d 679 (1962), the Nevada Supreme Court noted that the six month time limit in Rule 60(b) does not apply when the challenge is to a void judgment. It said: (at p. 337)

> "Under N.R.C.P. Rule 60(b) a motion to set aside a void judgment is not restricted to the six month's period specified in the rule."

The same rule was applied in *Lauer v. Eighth Judicial District* 62 Nev. 78, 84, 140 P.2d 953 (1943). See also *Dredge Corporation v. Peccole,* 89 Nev. 26, 505 P.2d 290 (1973) wherein the Court held that a void judgment could be attacked under Rule 60(b)(3) at any time, and reversed, holding that the motion under Rule 60(b)(3) should have been granted.

Insofar as the estate proceedings are concerned, the judgment herein is subject to collateral attack by way of a motion enjoining distribution (see Moore, Federal Practice, supra, quoted above). Rule 60(b) would not be the appropriate procedure in that action, since the judgment being challenged was not entered in that action.

CONCLUSION

From the foregoing, the following indisputable facts and legal principles appear: (1) Actual bias against the Plaintiff and her counsel existed in the trial judge from and after October 28, 1980; (2) From and after October 28, 1980; Judge Guinan was disqualified as a matter of law from performing any judicial functions in this case; (3) the rendering of Findings and Conclusions and a Judgment is a judicial function which Judge Guinan was precluded from doing after October 28, 1980; (4) the attempt to make Findings and Conclusions and render Judgment on November 5, 1980 was absolutely void and a legal nullity; (5) the challenge to such judgment herein is appropriate and timely; and (6) the challenge to such judgment is not subject to any defense of waiver and estoppel.

WHEREFORE, Plaintiff prays that her motion to vacate and set aside the judgment and for a new trial on the merits be granted.

DATED this _____ day of February, 1983.

Respectfully submitted

/s/ NADA NOVAKOVICH

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Appendix I

1.230 Grounds for disqualifying judges other than supreme court justices.

1. A judge shall not act as such in an action or proceeding when he entertains actual bias or prejudice for or against one of the parties to the action.

2. A judge shall not act as such in an action or proceeding when implied bias exists in any of the following respects:

(a) When he is a party to or interested in the action or proceeding.

(b) When he is related to either party by consanguinity or affinity within the third degree.

(c) When he has been attorney or counsel for either of the parties in the particular action or proceeding before the court.

(d) When he is related to an attorney or counselor for either of the parties by consanguinity or affinity within the third degree. This paragraph does not apply to the presentation of ex parte or uncontested matters, except in fixing fees for an attorney so related to the judge.

3. A judge, upon his own motion, may disqualify himself from acting in any matter upon the ground of actual or implied bias.

4. A judge or court shall not punish for contempt any person who proceeds under the provisions of this chapter for a change of judge in a case.

5. This section does not apply to the arrangement of the calendar or the regulation of the order of business.

[45:19:1865; A 1907, 25; 1927, 108; 1931, 247; 1937, 214; 1939, 255; 1931 NCL § 8407] + [45a:19:1865; added 1931, 247; 1931 NCL § 8407.01]—(NRS A 1957, 69; 1965, 551; 1969, 351; 1975, 608; 1977, 765)

1.235 Procedure for disqualifying judges other than supreme court justices.

1. Any party to an action or proceeding pending in any court other than the supreme court, who seeks to disqualify a judge for actual or implied bias or prejudice must file an affidavit specifying the facts upon which the disqualification is sought. The affidavit of a party represented by an attorney must be accompanied by a certificate of the attorney of record that the affidavit is filed in good faith and not interposed for delay. Except as provided in subsections 2 and 3, the affidavit must be filed:

(a) Not less than 20 days before the date set for trial or hearing of the case; or

(b) Not less than 3 days before the date set for the hearing of any pretrial matter.

2. Except as otherwise provided in this subsection and subsection 3, if a case is not assigned to a judge before the time required under subsection 1 for filing the affidavit, the affidavit must be filed:

(a) Within 10 days after the party or his attorney is notified that the case has been assigned to a judge;

(b) Before the hearing of any pretrial matter; or

(c) Before the jury is empaneled, evidence taken or any ruling made in the trial or hearing,

whichever occurs first. If the facts upon which disqualification of the judge is sought are not known to the party before he is notified of the assignment of the judge or before any pretrial hearing is held, the affidavit may be filed not later than the commencement of the trial or hearing of the case.

3. If a case is reassigned to a new judge and the time for filing the affidavit under subsection 1 and paragraph (a) of subsection 2 has expired, the parties have 10 days after notice of the new assignment within which to file the affidavit, and the trial or hearing of the case must be rescheduled for a date after the expiration of the 10-day period unless the parties stipulate to an earlier date.

4. At the time the affidavit is filed, a copy must be served upon the judge sought to be disqualified. Service must be made by delivering the copy to the judge personally or by leaving it at his chambers with some person of suitable age and discretion employed therein.

5. The judge against whom an affidavit alleging bias or prejudice is filed shall proceed no further with the matter and shall:

(a) Immediately transfer the case to another department of the court, if there is more than one department of the court in the district, or request the judge of another district court to preside at the trial or hearing of the matter; or

(b) File a written answer with the clerk of the court within 2 days after the affidavit is filed, admitting or denying any or all of the allegations contained in the affidavit and setting forth any additional facts which bear on the question of his disqualification. The question of the judge's disqualification must thereupon be heard and determined by another judge agreed upon by the parties or, if they are unable to agree, by a judge appointed:

(1) By the presiding judge of the judicial district in judicial districts having more than one judge, or if the presiding judge of the judicial district is sought to be disqualified, by the judge having the greatest number of years of service.

(2) By the supreme court in judicial districts having only one judge.

(Added to NRS by 1977, 767; A 1979, 59, 393; 1981, 319, 872)

Appendix J

IN THE SUPREME COURT
OF THE STATE OF NEVADA

CHARLES E. CORD and EDWARD D. NEUHOFF, Co-Executors of the Estate of E. L. CORD, aka ERRETT L. CORD, aka ERRETT LOBBAN CORD, deceased, and individually,
Petitioners,

vs.

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE AND THE HONORABLE MICHAEL GRIFFIN, DISTRICT JUDGE,
Respondents,

VIRGINIA KIRK CORD,
Real Party in Interest.

POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO PETITION FOR A WRIT OF PROHIBITION

COMES NOW the Real Party in Interest, VIRGINIA KIRK CORD, by and through her counsel, NADA NOVAKOVICH, ESQ., and hereby submits the following points and authorities in support of her Petition for a Writ of Prohibition in the above-captioned action:

SUMMARY OF RELEVANT FACTS

The record herein is large and complex; however, the portion thereof which pertains to the issues raised in this proceeding is very limited. On November 5, 1980, the Trial Court, the Honorable James J. Guinan presiding, rendered Findings of Fact, Conclusions of Law and Judgment dismissing the claim

of the Real Party in Interest, VIRGINIA KIRK CORD, to a community property share of the assets of the Estate of E. L. Cord, deceased. (Exhibit A to Petition) On January 16, 1981, the Trial Judge, in proceedings held on the record in open court, stated that he was recusing himself on his own motion at that time because he entertained an actual bias against the attorney for Mrs. Cord, and through her against Mrs. Cord, which arose on and had existed from October 28, 1980, when he was informed of a complaint made against him with the Judicial Discipline Commission made by counsel for Mrs. Cord. (Exhibit 1 attached hereto)

At the time such record was made, this case was already on appeal to this Court, the record had been docketed and the Appellant's Opening Brief filed. In fact the Opening Brief was filed the same day as the hearing transcribed in Exhibit 1 was held. The transcript of that hearing did not form a part of the record on appeal and the issue as to the effect of the actual bias of the Trial Court was not an issue on the appeal.

After the appellate decision affirming the judgment was rendered, the Real Party in Interest herein, Mrs. Cord, petitioned for a rehearing in this Court, and sought to supplement the record in this Court by filing the transcript which is hereto attached as Exhibit 1. As a part of such petition for rehearing, Mrs. Cord contended that a rehearing was necessary to correct substantial injustice because of the actual bias of the Trial Court. The petition was denied without hearing. Thereafter, Mrs. Cord filed a motion pursuant to Rule 60(b), N.R.C.P., in the Trial Court to vacate the void judgment, and also a motion in the probate proceedings to restrain distribution of the estate assets by reason of the fact that Mrs. Cord's claim to a portion thereof as her community property had not been finally adjudicated because the judgment was void.

GROUNDS OF OPPOSITION

1. That the grounds stated in support of the Petition for a Writ of Prohibition, being waiver, estoppel and preclusion by judgment (res judicata/collateral estoppel) do not apply to a void judgment.

2. That the Respondent Court clearly has jurisdiction to consider and decide the issues before it on the motions of the Real Party in Interest to restrain distribution and to vacate the void judgment pursuant to Rule 60(b), N.R.C.P.

3. That the Petition should be denied because the Petitioners have a plain, speedy and adequate remedy at law.

ARGUMENT ON GROUNDS OF OPPOSITION

A. THE DOCTRINES OF WAIVER, ESTOPPEL AND PRECLUSION BY JUDGMENT (RES JUDICATA/COLLATERAL ESTOPPEL) CANNOT PRECLUDE A COURT FROM DECLARING A JUDGMENT VOID.

In support of the Petition for a Writ of Prohibition, the Petitioners argue:

(1) Mrs. Cord had knowledge of the facts indicating the voidness of the judgment, but did not raise the issue on appeal and is therefore deemed to have waived her right to do so.

(2) Mrs. Cord admitted in the estate proceedings that if the petition for rehearing was denied, she would be without standing in the estate proceedings, and therefore is estopped from now contending that she has standing in such proceedings.

(3) That Mrs. Cord appealed the judgment on the merits, and having lost, is not permitted to change her position, and is therefore estopped from challenging the validity of the judgment.

(4) That Mrs. Cord raised the issue of the voidness of the judgment based on the actual bias of the Trial Court in her Petition for Rehearing, and thus the issue is precluded from consideration at this time by the doctrines of res judicata and collateral estoppel.

It is submitted that these contentions are not applicable when the judgment is "void" as opposed to being "voidable" or "erroneous". Nowhere in their Petition do the Petitioners suggest that the judgment herein entered is not "void"; it is clear from the record that the Trial Judge admitted an actual

bias existing from and after October 28, 1980. It is also clear from the record that the Trial Judge, after the creation of such actual bias but before its existence was revealed to the parties, signed, filed and entered the Findings of Fact, Conclusions of Law and Judgment on November 5, 1980. At the time the Record on Appeal was designated, the parties were still unaware of the existence of actual bias, and the record was still devoid of any evidence thereof. At the time of the filing of the Opening Brief, the Appellant, Mrs. Cord, had been made aware that the Trial Judge entertained an actual bias as of December 1, 1980, when he orally and unofficially revealed it, but he also disqualified himself *sua sponte* at that time, so that Mrs. Cord was not required to take any action thereon. The Court did not reveal on December 1, 1980 that the actual bias was created and existed prior to the rendition of final judgment. (See Appellant's Opening Brief, p. 4) That revelation was not made until the official proceeding on January 16, 1981, after the Opening Brief was filed and the issues on appeal were framed. That was the first time the record itself reflected that the actual bias existed as of October 28, 1980, prior to the filing and entry of Judgment. That revelation, however, was not part of the Record on Appeal, which had been transmitted to this Court before such revelation was made.

1. *Estoppel*

The Petitioners' first claim in support of their Petition for a Writ of Prohibition is that the Real Party in Interest, VIRGINIA KIRK CORD, is "estopped" from now challenging the judgment as "void" because her counsel took the position in the estate case that if the judgment became final by denial of her petition for rehearing, she would have no further standing in the estate proceedings. The language quoted from the record to support this assertion is set forth verbatim at pages 4 and 5 of the Petition. The emphasized language on page 4 is counsel's acknowledgment of her understanding of the Court's statement of its position. Understanding the position of the Court is

not the same as adopting that position as her own. The emphasized language on page 5 is counsel's statement, first that Mrs. Cord had a right to be in the estate proceedings because the petition for rehearing was still pending, and secondly her acknowledgment that the Court was correct when it stated it had already advised her of it's position. Neither of these statements constitutes the assumption of a position that the Real Party in Interest would be precluded by the decision on the Petition for Rehearing if it were unfavorable. That was the Court's position, not Mrs. Cord's position.

However, the issue is far more basic than whether the attorney for the Real Party in Interest elected to treat the Petition for Rehearing as dispositive. The fundamental issue is whether the Real Party in Interest can be effectively foreclosed by estoppel from challenging a judgment that is void because of the existence of actual bias which disqualified the Court from acting. The authorities relied upon by Petitioners in support of their Petition do not pertain to a "void" judgment. The case of *Renfro v. Forman*, 99 Nev. Adv. Op. No. 16 (1983) involved a judgment which was admittedly valid. The only issue was the finality thereof. The Defendants treated the judgment as final and appealed therefrom; after their appeal proved to be procedurally defective, they attempted to assert it was non-final so they could repeat the appeal process correctly. The Court held that having treated the judgment as final for appeal purposes, they were estopped from thereafter contending it was not final. This decision was in accord with prior decisions of this Court holding that treating a judgment or order as final and appealable estops the party from later claiming it to be non-final or non-appealable. (*State v. Commissioners of Lander County*, 22 Nev. 71, 35 Pac. 300 (1894): *Gamble v. Silver Peak*, 35 Nev. 319, 133 P. 926 (1912). Although the Petitioners refer to the issue precluded by estoppel as a "jurisdictional" issue, it is clear from the opinion that the "jurisdictional" issue was the finality of the judgment for appeal purposes, not the validity of the judgment itself in terms of the jurisdiction of the Court to render it. Non-finality does not render an order or judgment a legal nullity; it only

affects the time of its reviewability. If a party treats it as reviewable, he is thereafter estopped from claiming it to be non-reviewable. However, the doctrine of "estoppel" cannot breathe life into something that never had any legal existence in the first place; a "void" judgment, being a legal nullity, is as if it never existed. Parties may be estopped from changing their position by waiver of a defect which does not affect the power of the Court to act; or in certain instances consent to the power of the Court to act where it otherwise would not have such power, such as by filing a general appearance which effects a waiver of defects in the service of process. But where the Court has absolutely no authority to act at all, the parties cannot conver such authority by consent, and therefore, cannot be estopped from objecting thereto, even if such party appealed the judgment on the merits. (*State ex rel Abel v. Breen*, 41 Nev. 516, 173 Pac. 555 (1918); *Fitchett v. Henry*, 31 Nev. 326, 102 Pac. 865, 104 Pac. 1060 (1909); *B. F. Hastings & Co. v. Burning Moscow Co.*, 2 Nev. 93 (1866).

In the case at bar, the record clearly shows that the Trial Judge, by his own admission, entertained an actual bias as of October 28, 1980. That admission and the recognition of actual bias triggered the provisions of N.R.S. 1.230 which expressly prohibits the judge from acting as further in the proceeding. This statutory disqualification removed the power and authority of the Court to act, and therefore as a matter of law, any further acts on his part were absolutely null and void. Whatever the rule may be in other jurisdictions as to the effect of an order entered by a disqualified judge, the law in Nevada has been clear and unequivocal since the decision of *Frevert v. Smith*, 19 Nev. 363, 11 Pac. 273 (188) in which this Court said:

> "At common law, any action upon the part of a judge interested in the cause was regarded as an error or irregularity to be corrected by a reversal of his judgment; 'but the general effect of the statutory prohibitions in the several states in undoubtedly to change the rule of the common law so far as to render those acts of a judge involving the exercise of judicial discretion in a case where

he is disqualified from acting, not voidable, merely, but void.' (Citations omitted)

". . . The application to the judge, who was disqualified, might as well have been made to a stranger having no authority to act. If it had been granted. the order would have been absolutely null and void. Under these circumstances, the case must be treated as if no application had been made for any extension of time to file amendments."

This view was reaffirmed sixteen years later in *State ex rel Bullion & Exchange Bank v. Mack*, 26 Nev. 430, 69 Pac. 862 (1902).

This Court therein said:

"It is a rule of the common law that a judge shall not hear and determine actions in which he is interested, (citations omitted), and it is the express declaration of our statute (Comp. Laws 1900, sec. 2545) that a judge shall not act in an action or proceeding in which he is interested.

"Under this statutory rule the court has held that the act of a disqualified judge is absolutely void. (Frevert v. Swift, 19 Nev. 364; State v. Noyes, supra.)

In *Hoff v. Eighth Judicial District Court*, 79 Nev. 108, 378 P.2d 977 (1963), the judge was related to the district attorney. In holding that all orders entered by the judge at the defendant's arraignment were void, the Court said:

"It was further said in the Ebey case: 'A sound policy seems to demand that, independent of the rights of the parties to the action, the judicial tribunal appointed by law to administer justice should be preserved from discredit by a broad and liberal construction of the statute to the end of securing a judgment untainted with bias or interest. Courts should be slow to discover subtle and refined distinctions for indulging doubtful jurisdiction where the liberty of a citizen is at stake.

"The same policy has been announced in Nevada. In McCormick v. District Court, 67 Nev. 318, 331, 218 P.2d

939, 945, we stated: "The Legislature has thus declared the public policy of the state, not so much for the protection of an individual litigant, as for the preservation of the respect and high regard the public has always maintained for the courts.'

"As the statute quoted, the respondent judge was disqualified from proceeding at petitioner's arraignment, and as the orders at the arraignment were accordingly void, the same are hereby vacated."

It is therefore clear that under the law of the State of Nevada, the effect of bias or interest on the part of the trial judge is to create a duty in the judge which is mandatory; that duty is to forthwith disqualify himself and to refrain from taking any further action in the case. Any orders or judgments entered in violation of that duty are absolutely void, not merely voidable or erroneous. The statutory disqualification removes from the judge the power and authority, and therefore the jurisdiction, to act. The rule is the same in California and other jurisdictions. (See *In re Robert P.*, 121 Cal.App.3d 36, 175 Cal.Rptr. 252, 256 (1981); *People v. Hall*, 86 Cal.App.3d 753, 150 Cal.Rptr. 412 (1978); *T.P.B. Jr. v. Superior Court for the County of Alameda*, 66 Cal.App.3d 881, 136 Cal.Rptr. 311 (1977); *Woodman v. Savage*, 69 Cal.Rptr. 687 (Cal.App. 1968); *In re Jose S.*, 78 Cal.App.3d 619, 144 Cal.Rptr. 309 (1978); *McCartney v. Commission on Judicial Qualifications*, 12 Cal.3d 512, 531-532, 116 Cal.Rptr. 260 (1977); *Bolden v. State*, 561 S.W.2d 281 (Ark, 1978); *Cuyahoga County Board of Mental Retardation v. Association of Cuyahoga County Teachers*, 47 Ohio App.2d 28, 351 N.E.2d 777 (1975).

In the case which is factually similar to that at bar, the Georgia Court held that announced bias against an attorney related back to all orders entered from the time the attorney was first in the case. In *King v. Ellis*, 146 Ga.App. 157, 246 S.E.2d 1 (1978), the trial judge acknowledged a bias against defense counsel and on October 25, 1977 entered an order disqualifying himself from hearing any case in which a party

was represented by that attorney. The Court, in holding all prior orders void, stated:

> "Two of the appealable orders in this case were entered on October 21, 1977 and October 24, 1977 respectively. On October 25, 1977, the trial judge who signed these orders was disqualified from hearing any case in which a party was represented by defendant's counsel. On November 11, 1977, the third order involved in these appeals was entered and it was also signed by the disqualified judge. While the first two orders were entered prior to the announced disqualification of this trial judge, the fact of disqualification relates back and renders all of the orders or judicial acts taken by him void and nugatory. Garland v. State, 110 Ga.App. 756, 140 S.E.2d 46 . . ."

Since the statutory disqualification of the Trial Judge rendered all orders entered by him thereafter absolutely null and void, such judgments and orders fall within the classification of jurisdictional defects rendering them absolutely void, as opposed to voidable or erroneous. The Real Party in Interest could not have waived that jurisdictional defect if she wanted to, nor could she have consented that the judge proceed despite that disqualification. Although some causes for disqualification can be waived, actual bias is not one of them. Under Canon 3 of the Code of Judicial Conduct, a judge is required under sub-section (a) thereof to disqualify himself for actual bias. Other reasons for disqualification are enumerated in following sub-sections, such as (b) (acting for a party as attorney); (c) (prior association with lawyer for a party); (d) (financial interest) and (e) familial relationship. Canon 3(d) permits disqualification to be waived after full disclosure on the record *only* as to grounds (c) (d) and (e). This provision parallels the federal statute on disqualification (28 U.S.C.A. §455) which allows waiver as to some grounds for disqualification, but not for actual bias or interest. In construing the federal statute, the courts have held that the doctrines of waiver and estoppel may not be applied to validate an order

entered by a disqualified judge, and further, that the obligation to disqualify is the judge's obligation, and no duty can be imposed upon a party to move for such disqualification, nor can any time limit be imposed within which to challenge the validity of an order entered by a judge disqualified for actual bias or interest. Thus in *S.C.A. Services, Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977) the Court said:

> "As a defense to the proceedings in this court, respondent Lucky Stores claims that disqualification is required because S.C.A. has waived its right to enforce section 455. As evidence of its position, Lucky Stores notes the numerous proceedings which have been had in this case since S.C.A. learned of the existence of the familial relationship in February, 1976. Lucky Stores cites no case or other authority, however, to support its estoppel theory. Indeed, there is no basis in law to support this claim. The waiver section of Sec. 455 provides:
>
> > " 'No . . . judge . . . shall accept from the parties to the proceedings a waiver of any ground for disqualification enumerated in section (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.
>
> "The provisions are mandatory; they are addressed to the judge and require that he disqualify himself in certain circumstances. They were adopted because the drafters of the statute believed 'that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver.' They impose no duty on the parties to seek disqualification nor do they contain any time limit within which disqualification must be sought."

See also *United States v. Conforte*, 624 F.2d 869, 880-881 (9th Cir. 1980); *W. Clay Jackson Enterprises, Inc. v. Greyhound Leasing & Financial Corp.*, 467 F.Supp. 801 (D.C. Puerto Rico 1979)).

Even where the parties have consented to the judge continuing, despite announced grounds for disqualification, the doctrines of waiver and estoppel are unavailable to preserve the judgment from voidness. Thus in *Cummings v. Christenson*, 109 Misc.2d 255, 439 N.Y.S.2d 825 (N.Y. Fam.Ct. 1981), the Court in disqualifying itself on its own motion after the parties indicated they had no objection to his continuing on the case, stated:

> "However, statutes requiring disqualification on the basis of interest or bias are jurisdictional in nature, and the parties may not even consent that a judge sit as such on the case when the judge is disqualified by operation of statute. (Oakley v. Aspinwall, 3 N.Y. 547, p. 550; Castarella v. Castarella, 65 A.D.2d 614, 409 N.Y.S.2d 548 (2nd Dept. 1978); Queens Nassau Mtge. Co. v. Graham, 157 App.Div. 489, 142 N.Y.S. 180)."

Similarly, in *Lee v. State*, 555 S.W.2d 121 (Tex.Ct. Crim.App. 1977) the Court succinctly summarized the rule as follows:

> "Disqualification of a judge arising from a constitutional or statutory provision to preside over a trial or a case affects jurisdiction, and cannot be waived, and the judgment rendered is a nullity and void, and is subject even to collateral attack. (Citations omitted)"

It is thus clear that the disqualification of the trial judge for actual bias creates the type of jurisdictional defect which precludes the Court from having authority to act, and which is not curable by the consent or waiver of the parties. It is also not subject to the doctrine of estoppel, since the resulting orders and judgment never had any legal life or validity at all, but were a complete legal nullity. Therefore the doctrine of estoppel cannot defeat the jurisdiction of the trial court to entertain and decide upon the merits of the motions of the Real Party in Interest to declare the judgment and orders determining that VIRGINIA KIRK CORD had no community property

interest in the estate of the decedent, E. L. CORD, absolutely void, and to vacate the same. A Writ of Prohibition will therefore not lie.

2. *Preclusion by Judgment (Res Judicata/Collateral Estoppel)*

The second contention of the Petitioners in support of their Petition for a Writ of Prohibition is that the Real Party in Interest, VIRGINIA KIRK CORD, is precluded from raising the issue of the actual bias of the Court because (1) she raised it on the Petition for Rehearing in the Supreme Court, and is therefore precluded by the doctrine of res judicata; and (2) she failed to raise it as an issue on appeal and is therefore precluded by the doctrine of collateral estoppel.

In arguing that raising the issue by Petition for Rehearing, with extensive argument and rebuttal in the Answer to the Petition, the issue was presented and decided and therefore subject to the doctrine of res judicata, the Petitioners misapprehend the purpose and function of a Petition for Rehearing. A Petition only asks the Court to consider the issue; a denial of the petition for rehearing is not a ruling on the merits of the issue, but only the declination of the Court to grant a hearing thereon. The reliance of the Court on Rule 40(c)(1) in denying the Petition in this case is a recognition that the issue had not been previously raised, and therefore that it would not be entertained at that time by way of rehearing. In essence this Court was directing the Real Party in Interest to raise the issue at the trial level, and to obtain a decision thereon before asking the Supreme Court to review it in the exercise of its appellate jurisdiction. Thus the denial of the petition for rehearing is not a ruling on the merits of the issues raised therein, but rather is a determination not to entertain such issues and rule thereon. Argument on the merits of the issue is only permitted if rehearing is granted. This distinction was clearly pointed out by this Court in *Gershenhorn v. Stutz*, 72 Nev. 293, 313, 304 P.2d 395 (1956) wherein it stated:

> "With increasing frequency counsel seem to be confusing the function of a petition for rehearing with the rehearing itself . . .
>
> "We deem this an appropriate occasion to point out to the members of the bar that argument upon the merits is out of place in a petition for rehearing. The petition asks leave to argue and should, therefore, confine itself to a statement of the points upon which the right to present argument and authority is sought. See "Rehearing in American Appellate Courts", 44 Cal. Law Review 627 . . . 'It [the petition for rehearing] should not be expected to also serve the role of persuading the court how the conflict or error should be resolved. That is the object of resubmission. The object of the petition is only to show that the petitioner is entitled to a rehearing, not that he is entitled to a different decision on the merits."

See also *In re Powell's Estate*, 62 Nev. 121, 132, 140 P.2d 948 (1943). Thus the issue as to the voidness of the judgment, while raised, has not been heard and decided, and therefore the doctrine of res judicata is not applicable. (*Cf. Schwartz v. Schwartz*, 95 Nev. 202, 206 (footnote 2), 591 P.2d 1137 (1979).

The Petitioners further contend that even if the denial of the petition for a rehearing is not a final determination on the merits of the issue, the Real Party in Interest should be precluded by the doctrine of collateral estoppel, since she could have raised the issue and failed to do so. This argument completely overlooks the requirement that the basic threshhold requirement to any form of issue preclusion is a valid judgment or order. The references to *Spilsbury v. Spilsbury*, 92 Nev. 464, 466, 553 P.2d 421 (1976) and *Lucas v. Page*, 91 Nev. 493, 494, 538 P.2d 165 (1975) are in applicable, since both those decisions require as a condition to the application of the doctrine of res judicata or collateral estoppel that the question not only be put in issue, but that it be "directly determined by a court of competent jurisdiction". The entire issue herein is whether the order was entered by a "court of competent jurisdiction", since the disqualification of the trial court defeated his jurisdiction to act. The Petitioners' reliance on the decisions of *Lubben v.*

Selective Service System Local Bd. No. 27, 453 F.2d 645, 549 (1st Cir. 1972) and *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 317, 60 S.Ct. 317, 84 L.Ed. 329 (1940) is similarly misplaced. Each of those cases involved a situation where the Court clearly had jurisdiction over the subject matter and jurisdiction over the parties. The question was the statutory authority of the Court to entertain the particular matter or grant the particular relief sought by the parties. In *Lubben*, the issue was the validity of an injunction requiring certain action by the Selective Service Board. The Court ordered the injunction; thereafter, in another case the precedential authority upon which the Court relied in determining it had the power to issue such injunction was overruled. The enjoined party then sought, after its appeal had been dismissed without a ruling on the merits, to vacate the injunction on the grounds that it was improper by reason of the intervening ruling. The Court held that the trial court had jurisdiction to determine its power or jurisdiction to enter the challenged order; any challenge to the validity of the enabling legislation would have to be raised on direct appeal. Similarly in the *Chicot* case, the validity of an order of a federal court acting in bankruptcy approving a plan of arrangement was collaterally challenged by reason of an intervening decision holding the Bankruptcy Act to be unconstitutional. The United States Supreme Court, in precluding such collateral attack, stated that the federal court had the jurisdiction to act at the time it acted, and the jurisdiction to determine the validity of the enabling legislation under which it acted. Any challenge to the enabling legislation required a direct appeal. The following statement in the *Chicot* decision was quoted with approval by the Court in *Lubben* in support of its determination that the intervening decision on the validity of the enabling legislation did not defeat the jurisdiction of the court which acted prior to such intervening decision, and whose acts were not challenged on direct appeal:

> "The argument is pressed that the District Court was sitting as a court of bankruptcy, with the limited jurisdic-

> tion conferred by statute, and that, as the statute was later declared to be invalid, the District Court was without jurisdiction to entertain the proceeding and hence its declaration is open to collateral attack. We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally."

The situation presented in the *Chicot* and *Lubben* cases is far different than the situation herein presented where the trial court had no authority to act at all because of statutory disqualification, and therefore the parties were not before the Court in accordance with the requirements of due process.

The situation presented herein is the situation of a Court whose judgment is absolutely void because it had no jurisdiction to enter it. This Court has recognized that even the most stringent form of issue preclusion, that constitutionally mandated in criminal cases by the Sixth Amendment double jeopardy provision, has no applicability when the judgment relied on for such preclusion was void. Thus, In the Matter of Alexander, 80 Nev. 354, 393 P.2d 615 (1964) the defendant was tried on an indictment for murder, convicted and sentenced to life imprisonment without the possibility of parole. On a petition for a writ of habeas corpus, it was contended and found that the indictment was defective for failure to allege that the homicide occurred within the State of Nevada. This Court therein said: [at p. 358]

> "We are compelled to hold that the failure of the indictment to allege that the crime was committed in the State of Nevada was fatal and that the district court never

> acquired jurisdiction to try the case, and that its judgment was void. It is ordered that the petitioner be discharged from custody. However, . . . the district attorney is not precluded from submitting the matter to another grand jury . . . An acquittal or a conviction by a court having no jurisdiction is void; therefore, it is not a bar to subsequent indictment and trial by a court which has jurisdiction over the offense. (Citations omitted)."

This rule was thereafter reaffirmed in *Williams v. Municipal Judge*, 85 Nev. 425, 456 P.2d 440 (1969) wherein the defendant pled guilty to a defective complaint in municipal court and thereafter hired an attorney and appealed to district court. The City thereafter filed a second complaint. In rejecting the defense of double jeopardy, or preclusion by the prior conviction, this Court said, after quoting from *In re Alexander supra* with approval:

> "Because the initial complaint was fatally defective, the municipal court never acquired jurisdiction over Williams. Since the court was without jurisdiction, Williams' conviction was void. Therefore, the prior conviction is not a bar to the present proceedings, and double jeopardy has not attached."

The same rule prevails when a civil judgment or order is entered by a Court which did not have the power or authority to enter it. Thus, in *Phillips v. Loberg*, 607 P.2d 561 (Mont. 1980) the Court, in rejecting the contention that the Defendant Loberg was precluded from challenging the validity of writs of execution and attachment which he ignored, and in violation of which he paid the debtor instead of the attaching creditor, and for which he had previously been adjudged in contempt, the Court found that the writs were defective for failure to contain the required statutory notice that the specific debt was being attached, and then said:

> "The record in our present appeal discloses that only the writs of attachment and the writ of execution were

> served upon Garrett Loberg. He never received a notice that the debt owing to George McIntyre was attached in pursuance of the writ. . . Since there was never a proper attachment the writs themselves were a nullity and could not provide a basis for the contempt citation.
>
> "Once it is shown that a collateral attack is proper and the underlying judgment is void, it will not have any preclusive effect and the case must be tried on the merits. Here it was error for the District Court to conclude its order granting plaintiff's (creditor) motion to strike the enumerated defenses by stating that 'the doctrines of collateral attack, collateral estoppel and res judicata preclude relitigation of the issues."

Similarly, in *Matter of Estate of Blaney*, 607 P.2d 354 (Wyo. 1980), and in *Stroock v. Kirby Royalties, Inc.*, 494 P.2d 197 (Wyo. 1972) the Wyoming Court held that a void judgment cannot be pleaded to bar an action under the doctrines of res judicata or collateral estoppel. The Oregon Court held likewise in *No. Pac. Steamship Co. v. Guarisco*, 49 Or.App. 331, 619 P.2d 1307 (198) wherein it noted:

> " . . . [T]here can be no collateral estoppel effect on this case, and the entry of summary judgment cannot stand."

The Oregon case cited by Petitioners, Gem Mfg. Corporation v. Lents Industries, Inc., 276 Or. 87, 554 P.2d 166 (1976) is completely inapposite. It dealt only with the limited issue of whether a defendant against whom judgment was entered by default in a sister state was permitted to assert counterclaims against such judgment when it was sought to be registered in Oregon pursuant to the Uniform Enforcement of Foreign Judgments Act. The Court held that the act precluded the assertion of counterclaims, and that the only issue before the Court under the act was the validity of the judgment of the sister state.

In this case the judgment is void because the Court was without power to act; therefore it is subject to direct and

collateral attack, and is not subject to any form of issue preclusion. The doctrines of res judicata and collateral estoppel are not an impediment to the jurisdiction of the Trial Court to determine the merits of the motions presently pending.

B. THE RESPONDENT COURT HAS JURISDICTION TO DETERMINE THE MERITS OF THE MOTIONS PENDING UNDER N.R.C.P. RULE 60(b) AND TO RESTRAIN DISTRIBUTION IN THE ESTATE PROCEEDING.

The function of a Writ of Prohibition is to arrest the action of a tribunal which is without or in excess of its jurisdiction. The perameters of this rule were stated by this Court in *Goicoechea v. Fourth Judicial District Court*, 96 Nev. 287, 607 P.2d 1140 (1980) as follows:

> "2. A writ of prohibition, like a writ of certiorari, will not issue if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration. Arascada v. District Court, 44 Nev. 37, 187 P. 621 (1920). The purpose of the writ of prohibition is not to correct errors, but to prevent courts from transcending the limitations of their jurisdiction in the exercise of the judicial power. Walser v. Moran, 42 Nev. 111, 173 P. 1149 (1918) modified on rehearing, 42 Nev. 156, 180 P. 492 (1918).
>
> "Thus, since we have concluded that the district court did not exceed the limits of its jurisdiction in this case, prohibition will not lie to review its action. See Houston Gen. Ins. Co. v. District Court, 94 Nev. 247, 578 P.2d 758 (1978)."

There can be no serious question that the Trial Court and the Probate Court have jurisdiction to entertain the motions of the Real Party in Interest presently pending before them. Both motions are directed to the contention that the judgment at issue is "void". The motion filed in the action in which the judgment was issued is to vacate the same because of such voidness, and is filed under Rule 60(b) N.R.C.P. The motion in

the Probate Court is to restrain distribution of the assets of the estate because the claimant's interest in such assets has not been finally determined. Both motions are appropriate under the applicable provisions of law to attack the judgment which the Real Party in Interest alleges is "void", and the Court, having jurisdiction over the subject matter of such motions and the parties, and not being otherwise disqualified, has the power and authority to act. A direct challenge in the Court which entered the judgment is the preferable procedure (*Osman v. Cobb*, 77 Nev. 133, 360 P.2d 258 (1961), which challenge may be brought pursuant to the provisions of Rule 60(b) N.R.C.P. without reference to the six month time limitation therein imposed. (*Foster v. Lewis*, 78 Nev. 330, 372 P.2d 679 (1962); *Lauer v. Eighth Judicial District Court*, 62 Nev. 78, 84, 140 P.2d 953 (1943); *cf. Dredge Corporation v. Peccole*, 89 Nev. 26, 505 P.2d 290 (1973)). A collateral challenge may also be made in another Court, where the Court's actions are dependent upon the validity of the judgment which is alleged to be void. (*LaPotin v. LaPotin*, 75 Nev. 265, 339 P.2d 123 (1959). As noted in Moore's Federal Practice, ¶ 60.25(2), pp. 300-301:

> "A void judgment is something very different than a valid judgment. The void judgment creates no binding obligation upon the parties, or their privies; it is legally ineffective. And while, if it is a judgment rendered by a federal district court, the court which rendered it may set it aside under Rule 59, within the short time period therein provided, or the judgment may be reversed or set aside upon an appeal taken within the due time where the record is adequate to show voidness, the judgment may also be set aside under 60(b)(4) within a 'reasonable time', which, as here applied, means generally no time limit, the enforcement of the judgment may be enjoined, or the judgment may be collaterally attacked at any time in any proceeding, state or federal, in which the effect of the judgment comes in issue, which means that if the judgment is void it should be treated as legally ineffective in the subsequent proceedings. Even the party which ob-

> tained the void judgment may collaterally attack it. And the substance of these principles are equally applicable to a void state judgment."

There is no jurisdictional impediment to the Trial Court hearing and determining the motions and the defenses which the Petitioners have attempted to assert thereto in their Petition. The claim that this case has been prolonged is not an objection going to the jurisdiction of the Court; the prolonged litigation history of this case has been directed to the merits—a challenge to a judgment as void is not concerned with the merits—the issue is the power of the Court to act at all. (*Seaborn v. First Judicial District Court*, 55 Nev. 206, 29 P.2d 500 (1934).

It is therefore submitted that there being no question as to the fact that the determination of the pending motions is well within the jurisdiction of the Trial Court, the petition for a writ of prohibition is without merit and should be denied.

C. THE PETITIONERS HAVE AN ADEQUATE REMEDY AT LAW.

Under N.R.S. 34.320 and 34.330, a writ of prohibition may only be issued if the petitioners are without an adequate remedy at law. The Petitioners herein are not claiming that the judgment is void; if that were their claim then a petition for a writ of prohibition might be appropriate. They are claiming, instead, that the Real Party in Interest is precluded by estoppel, waiver, res judicata or collateral estoppel, from asserting that the judgment is void. These issues can properly be determined by the trial court, and an appeal would lie from such determination. Under such circumstances, the issuance of a writ of prohibition is not appropriate. The claim that an appeal would take too long was rejected by this Court in *Diotallevi v. Second Judicial District Court*, 93 Nev. 633, 572 P.2d 214 (1977), wherein it stated:

> "2. A writ of prohibition may be issued by this court only in cases 'where there is not a plain, speedy and

adequate remedy in the ordinary course of law.' N.R.S. 34.330. The general rule is that if an order or judgment is appealable, a writ of prohibition will not lie to prevent its enforcement. Heilig v. Christiansen, 91 Nev. 120, 532 P.2d 267 (1975), cert. denied 423 U.S. 1055 (1976). The order which the petitioner contends the court below should be prevented from carrying out is appealable by virtue of N.R.S. 155.190, subsections 6 and 13. Under those provisions, petitioner could have appealed the confirmation of the lease-sale to Cal Neva and the refusal of the Court to confirm the lease-sale to him."

SUMMARY AND CONCLUSION

It is clear that the Trial Court has jurisdiction to entertain and rule upon the merits of the motions made by the Real Party in Interest; it is also clear that any such ruling would be appealable and reviewable on appeal by this Court. The merits of the objections to the motion which are presented in the Petition do not defeat the jurisdiction of the court; in fact as amply demonstrated herein, those objections, being estoppel, waiver, collateral estoppel and res judicata, are not even available when the challenge is that the judgment is void because the Court which entered it was without power or authority to act. It is therefore submitted that the Petition for a Writ of Prohibition should be denied.

DATED this 8th day of April, 1983.

Respectfully submitted

/s/ NADA NOVAKOVICH

Nada Novakovich
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Interest, VIRGINIA KIRK CORD